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THE RIGHT OF EXPATRIATION.

All writers on political law agree that states, as well as individuals, have the right of self-preservation, and therefore the right to, and to the use of, those means and measures which are calculated to secure their perpetuity, safety, and tranquillity. Among the rights which have been deemed necessary for this end, is that of determining the character of citizenship, which involves the question of the right of expatriation. Yet, as a power given for a certain end is limited by that end, obviously there is a limit to the power which a government may exercise for this as for any other purpose. All its powers must be consistent with the proposed object of the government, — the happiness of the governed. As there are some duties and responsibilities which the subject cannot throw off upon the state, there are corresponding rights of which the state cannot deprive him; for a duty includes the right.

Among these rights, have been placed natural and moral liberty; for to take away these, is "to take away the power of choice and throw the subject at once into the necessity of doing wrong."

"Suppose," says Grotius, "one had asked those who first formed the civil laws, whether they had intended to impose on all subjects the fatal necessity of dying rather than taking

up arms to defend themselves against the violence of their sovereign; I do not know whether they would have answered in the affirmative. It is rather reasonable to suppose that they would have declared that the people ought not to endure all manner of injuries, except where matters are so situated that resistance would infallibly produce very great troubles in the state or tend to the ruin of many innocent people."*

Cicero, speaking of this very question, said that this natural liberty was among the firmest foundations of Roman liberty. "*Ne quis invitus civitate mutetur; neve in civitate maneat invitus: Hæc sunt enim fundamenta firmissama nostræ libertatæ.*"†

This question has usually been discussed with reference to either one or the other of two general doctrines of sovereignty, — the feudal, (which is the common law doctrine,) and that of the Republic of Rome. The former, growing out of the relation of lord and vassal and the doctrine of hereditary right, bound by an indissoluble tie the body of the subject to the accidental place of his birth, creating, says Mr. Justice Blackstone, "an allegiance which cannot be cancelled or altered by any change of time, place, circumstance, or by anything except the united concurrence of the legislature;" ‡ while the Roman Republic, on the other hand deriving its powers from the consent of the governed, adopted the maxim, *Mobilia sequuntur personam*, and gave to her citizens the most unrestrained liberty of locomotion.

In this country the question is yet wholly unsettled. On one side it has been contended that the common law on the subject is in force here, as it was the law during the settlement of the country and its colonial existence, and has never been repealed by positive legislation. Independently of this consideration, it is further claimed that this right over the citizen is, to a certain extent, implied in his assent to the existence of the government; and it is argued that it is incongruous and senseless to admit the right, and deny to the government the power of exercising it, and thus of preserving it.

"The compact between the community and its members," said Chief Justice Ellsworth in the District Court of Connecticut, "was that the community should protect its mem-

* Book 1, ch. 4, Right of War and Peace. † Orat. pro. L. C. Balbo, ch. 13.
‡ Com., book 1, sec. 389.

bers, and that the members should at all times be obedient to the laws of the community, and faithful to its defence. No member could "dissolve the compact without the consent or default of the community." *

And it is further argued on this side, that if there is no restraint upon one citizen removing from the state or government at pleasure, there is no power to restrain the multitude, who, in case of invasion, might leave the state without a protector, and their own benefactors, the officers of government, to the mercy of the invader.

On the other side it is maintained, that the right of expatriation, *i. e.* of removing from one state and choosing a residence in another, is a right of nature, antecedent and superior to all law, a dictate of the right of natural liberty pointing to

> The wide world before us, where
> *To choose our place* of rest; Providence our guide.

Vattel's opinion is on the side of this more liberal doctrine. He says, "There are cases in which a citizen has an absolute right to renounce his country and abandon it entirely, — a right founded on claims derived from the very nature of the social compact. 1. If the citizen cannot procure subsistence in his own country, it is undoubtedly lawful for him to seek it elsewhere; for political or civil society being entered into only with a view of facilitating to each of its members the means of supporting himself and of living in happiness and safety, it would be absurd to pretend that a member, when it cannot furnish such things as are most necessary, has not a right to leave it." † He mentions the case of Patkul, who was sentenced and executed by Charles XII. of Sweden, and denounces it with his characteristic energy. Patkul was born and lived in Sweden till twelve years of age, then removed himself and property, with consent of the reigning sovereign, to Livonia, which state afterwards became involved in war with Sweden, in which Patkul, then a general in the Livonian army, was taken prisoner and executed by the Swedes, says Vattel, "in violation of the laws of justice."

And referring to the old laws of the German states, which did not permit a state to receive the subjects of another state, the same author declares that it had no other founda-

* 2 Cranch, 32. † Law of Nations, book 1, ch. 19.

tion than the slavery to which the people were then reduced.

It is not a little singular that those European governments which at times at least have been the most despotic and illiberal toward the rights of individuals within their own territories, have given their subjects the largest liberty and facility in removing and taking up residence in a foreign country. Thus in Russia, good faith and freedom from debt seem to be all that is requisite; and ten years' absence, without being heard from, is tantamount to a formal renunciation of all claims and allegiance to the Russian government. The seventeenth article of the Code Napoleon declares that the French character shall be lost by naturalization in a foreign country, by accepting public employment from a foreign government without the sanction of the supreme authority of France, and "by every establishment made in a foreign country *sans esprit de retour;*" while in England a doctrine has been maintained which renders the government a despotism, and the subjects slaves. So far has the doctrine of perpetual allegiance been carried, that treasons against Henry VI., for attempting to expatriate, &c. were capitally punished by Edward IV. after he had regained his crown, and Henry had solemnly been declared usurper by parliament. Sir Michael Foster says that it was laid down, in a meeting of all the judges in England, that if an alien seeking the protection of the crown, and having his effects and family here, should return to his native country for the purposes of hostility, and join the king's enemies, he may be dealt with as a traitor;* so that it could never be safe for an alien to seek such protection, and would always be equally dangerous for a native to leave it, being liable under corresponding penalties to be called home at the order of the crown.

This question first came before the Supreme Court of the United States in 1795 in the case of *Talbert* v. *Jansen*† on a writ of error from the Circuit Court of the District of South Carolina. It was argued with great ability and learning by counsel on both sides; especially by the counsel for the defendant, who contended that a subject might dissolve his allegiance to his native country when his happiness required it, if the government under which he lived failed to secure his happiness.

*Foster's Rep. 185. †3 Dallas, 133.

The counsel cited as memorable instances of the expatriation of entire nations, "done with the approbation of all men," the desertion of Athens on the approach of the Persians; and the emigration, in 1771, of the "Tourgouths," fifty thousand families, from the banks of the Volga, in Russia, and their settlement in the domains of the Emperor of China, who "hospitably received them and erected a monument on the spot to commemorate the event." The court, as such, gave no opinion upon the question; but several members of it intimated that although a citizen might do all required of him by the laws of a particular State — as was done in this case — for the purpose of dissolving his allegiance to that State, still, this could not affect the rights of the United States government, which were paramount to those of a State; that the rights of the subject in this regard were to be exercised subordinately to public interest and safety, and ought to be regulated by law. PATERSON, J., said that although a citizen might have formally renounced his allegiance to the United States, if he had not actually entered into allegiance with a foreign power he was still an American citizen, "unless perchance he should be a citizen of the world, which would be a creature of the imagination too far refined for any republic of ancient or modern times." The court by their decision substantially left the question where it was before.

In the same year the question was brought before the Circuit Court of the United States for the District of Connecticut, in which ELLSWORTH, C. J., is reported to have used the language above quoted, and decided that the common law remained as it was before the Revolution, and was the law of this country. And it cannot be questioned that the leaning of the decisions of the Supreme Court of the United States is in this direction. Mr. Chancellor Kent said it was the natural inference from all decisions down to his time.* He, unfortunately, gave us no opinion of his own.

The doctrine of the common law, however, has not been followed by many of the State courts, and it must be acknowledged that practically by the executive branch of the United States government that doctrine has often been repudiated totally.

In the war of 1812, with England, the government

* Com., vol. 2, p. 49.

declared that if the adopted Irish citizens of this country who had been taken prisoners in her service were treated as traitors by the British government, the United States would retaliate by executions of British prisoners, even without distinction of rank; deeming this only another form of the contest in which they were then contending.

As lately as 1839, the following language is reported to have been used by the Chief Justice of Kentucky, in a case raising this question: —

"Whatever," said he, "may be the speculative or practical doctrine of feudal governments or ages, allegiance in the United States, whether local or national, is in our judgment altogether conventional, and may be repudiated by the native as well as adopted citizen, with the presumed concurrence of the government, without its formal or express sanction. Expatriation may be considered a practical and fundamental doctrine of America. American history, American institutions, and American legislation, all recognize it; it has grown with our growth, and strengthened with our strength." * And he decides that when the government is silent, the citizen's right to abjure its authority, and denationalize himself, is unquestionable.

The form of this question, which is of most practical interest at the present time to a large number of citizens of this country, and therefore to the government, is, whether the protection of the government extends to adopted citizens peacefully visiting their native country for a temporary purpose as well as to native-born citizens.

The question in this form has several times been brought to the attention of the government, and has as often been differently decided. Mr. Wheaton when Minister to Berlin, being called upon to interfere in behalf of a naturalized American citizen against a claim upon him for military service by the Prussian government, laid down the law of the United States, as he considered it, as follows: "Had you," said he, addressing the person upon whom the claim was made, "remained in the United States, or visited any other foreign country except Prussia, on your lawful business, you would have been protected by the American authorities, at home and abroad, in the enjoyment of all your rights and privileges as a naturalized citizen of the United States. But having returned to the country of your birth, your

*Alsberry v. Hawkins, 9 Dana.

native domicile and character revert, (so long as you remain in the Prussian dominions,) and you are bound in all respects to obey the laws exactly as if you had never emigrated." Mr. Marcy, Secretary of State in the last administration, declared substantially the same doctrine.

Mr. Cass, our present Secretary, has however materially modified this doctrine, and explicitly denies that a naturalized citizen of the United States returning to the country of his birth "is bound in all respects to obey the laws exactly as if he had never emigrated."

In his somewhat celebrated letter, dated June 14, 1859, in answer to certain inquiries of a naturalized citizen respecting his rights and liabilities, the honorable Secretary said: "The position of the United States as communicated, &c. &c. is that native-born Prussians naturalized by the United States, and returning to the country of their birth, are not liable to any duties and penalties, except such as were existing at the period of their emigration. If at that time they were in the army, or actually called into it, such emigration and naturalization do not exempt them from the legal penalty which they incurred by their desertion." And he further says "that in this age of the world the idea of controlling the citizen in the choice of a home, and binding him by a political theory to inhabit for his lifetime a country which he constantly desires to leave, can hardly be entertained by any government whatever."

This is certainly a wide departure from the doctrine of the common law; but if we do not greatly err in our understanding of the fundamental principles of the government of the United States, this opinion of Mr. Cass more nearly expresses its doctrine upon this subject than any other authoritative exposition of it yet made.

It would seem broad enough to satisfy the most catholic view, and yet it contains well-defined limits to certain arbitrary claims heretofore made by many governments, which limits "in this age of the world" it may be pronounced safe to *attempt* to maintain. It answers the conditions of the public law of nations, which from its nature can exact but little more than the exercise of good faith and fair dealing.

It is difficult to understand why the mere manner of becoming a citizen should affect one's rights. Do we still attach such an importance to the mere accident of birth-

place, which by the common law it was impossible to make the test of citizenship? The offspring cannot be in a better condition than his parents, — *Partus sequitur ventrem;* and, (to carry out the argument of those who say that the consent of the government is necessary to enable a citizen to abjure his allegiance,) if a government has never consented to the emigration and expatriation of parents, how are their offspring free?

It cannot be doubted that a change of public sentiment upon this question has been rapidly going on during the last few years, not only in this country, but in Europe, towards a more liberal doctrine than that of feudalism. The new and available facilities of communication and intercourse between nations require it. The interests of commerce, of science and liberal culture, require it.

NICHOLAS HILL.

THE death of a leader of the bar, in the meridian of his powers and success, and when he is filling so large and important a place in life, excites afresh that regret which always follows the transient fame of the lawyer or the orator. A fond tradition perpetuates, for a time, the memory of professional victories and of intellectual triumphs, but there is no permanent record of them, and they do not live beyond the brief memories of those who felt their present influence. We reward the successful lawyer with no titles or dignities, and rarely with the meaner recompense of large fortune. Mr. Webster summed up the result of American professional success in the terse statement, that all the good lawyers whom he had known "lived well and died poor."

There is enough, however, in the success itself, in the position and character of a great lawyer, to kindle and satisfy a generous ambition. Very few who have attained that eminence have done more to dignify it, than Nicholas Hill, of New York. A leader of the profession, it may be said of him, that his example can only raise the standard of professional duty and honor. It is fit that his character should receive some recognition beyond the limits of the immediate field of his practice. The profession itself owes a debt to

one who has in every form so generously discharged his debt to the profession.

Nicholas Hill was born in Florida, Montgomery County, New York, in 1805. At an early age he left his home to make his own fortune and career. He maintained himself by surveying, teaching school, and other occupations, while he gave himself with enthusiasm to the study of the law. In 1829 he was admitted to the bar, and began to practice in the town of Amsterdam, but soon removed to Saratoga Springs. Here his practice grew, and his first successes were gained. He became associated with Judge Cowen in the preparation of the notes to Phillips on Evidence, a labor of many years, and one by which he is perhaps most widely known. In 1840 he was appointed reporter of the decisions of the Supreme Court, and soon after removed to Albany. This office he resigned, however, in 1845, and from that time down to his sudden death in May, 1859, he gave himself to the active and laborious practice of his profession, and became a leader, perhaps it is not too much to say the leader, among the lawyers of his State.

This rapid outline of the incidents of his life serves only to show, by its barrenness and the length of its intervals, how much of that life was given to silent and laborious work, and how little to any of those pursuits which court popular favor or win popular applause. Whatever success Mr. Hill gained, and whatever fame he won, is all professional. And so far as not being or trying to be distinctively anything else, exposes one to that imputation, he is open to the reproach, if it be one, of being a "*mere lawyer.*" It is of his legal character and his legal labors that we wish to speak.

The earliest and some of the best years of his professional life, were occupied with the preparation of the notes to Phillips on Evidence, a work which is too familiar to the profession to need any extended notice.

The authors describe their work as an attempt to trace through the reports the connection between the cases and their principle, by presenting in connection with the principle stated in the text-book, the manner in which it has been made to act upon cases in the various combination of their circumstances. These notes are full and accurate, giving condensed statements of the result of the decisions, and tracing principles in their historical and logical development; relying not upon reasoning or speculation, however accurate

or ingenious, but upon the decided cases. Perhaps the form of a separate treatise would have given better opportunities to the authors. Mr. Hill, however, found the work commenced by Judge Cowen, and is relieved from the responsibility of the plan, while he is entitled to a large share of the honor of its skilful execution; and although the book is useful mainly as containing the best collection of the American authorities on many subjects, yet it is far from being a mere digest. It is certain, however, that if it may in some degree be open to Lord Coke's objection to abridgments, yet, according to his own concession, it "greatly profited the authors themselves." For it was to the patient and thorough training of its authorship, that Mr. Hill owed in a great measure his full and exact legal learning, and the grasp of principle by which his arguments were always distinguished.

The reports also, of which he edited seven volumes, indicate the same fidelity, accuracy, and care.

But it was after he ceased to be reporter, and gave himself exclusively to the practice of the law in Albany, that the best work of his life was performed.

He soon arranged his business so that he was occupied almost exclusively with the argument of questions of law in the higher courts. His previous training had prepared him for precisely this field of practice. He had acquired habits of legal research, and great familiarity with decided cases, and surprising power and facility of labor. Indeed, as must be the case with every successful man in any pursuit, his distinctive and preëminent capacity was effective and unwearied industry. No case was so familiar to him in its principles, that he failed to prepare it thoroughly in its details, exactly and carefully from its beginning; and even as to the form of his argument, he adopted no words or researches of others, but insisted in all cases upon preparing and speaking from his own brief.

To these qualities he added that mental honesty, without which no man can be a great lawyer, and a kindness of heart which enabled him to disarm, or rather never to excite the jealousies and animosities which are so apt to follow success at the bar. With perhaps none of those arts which win verdicts in the game of a trial by various and indirect means, he had all those powers by which the victory is fairly won.

But the best tribute to his professional and personal character is to be found in the testimony of the bench and the bar of his own State.

Judge Johnson, speaking for the Court of Appeals, says: "During the twelve years of the existence of this court, Mr. Hill has at all times been largely concerned in its business, and of late has argued nearly one quarter of the causes orally debated. He was never satisfied until he had exhausted all the resources of learning and reflection upon any subject. He made no parade of learning; so much as the occasion called for was always at his command, and so much he employed; but thoroughly imbued with the principles of the law, it was his delight to rest his cases upon them. He had so great a reverence for the law itself, and felt so deeply its harmonious structure, that he would rather have failed of success than have won it by trenching upon a sound rule. His arguments were therefore marked no less by the masterly handling of legal principles than by the entire candor and fairness with which he encountered the difficulties standing in his way. He was a man of entire integrity, of unflinching courage, and of perfect truth."

Shortly after Mr. Hill's death, Charles O'Conor, whose testimony may well be taken as representing the judgment of the bar at which Mr. Hill practised, spoke of him as follows: —

"Twenty-five years only of professional life were accorded to him; but in that space how much he accomplished! First, let us contemplate the long term necessarily occupied by the young lawyer in approving himself as worthy of confidence, by the severe test of actual experience, under the eyes of the bench, the bar, and the public; then the progression, steady and gradual, as it must always be if accomplished at all, from an estimation merely local and partial to extended fame, — the indispensable basis of high professional success. In some instances these steps seem to be achieved rapidly, each as it were at a single bound; but in our profession an advance of this kind is generally unreal. In Mr. Hill's career, each step was taken deliberately and on firm ground; each advance was marked by substantial fruits.

When summoned from earth, though he had only attained his fifty-third year, he had confessedly the first place at our bar. A purity of life that knew no blemish; an integrity

that no man ever impeached, even in thought; a love of justice that shone out in every word he uttered as an advocate or as an adviser; a calm, clear-sighted, investigating intellect, ripened to fullest maturity and energy by fixed habits of intense application, which never left in any case a relevant fact undiscovered, or overlooked a pertinent legal principle; — these were some of the qualities which secured Nicholas Hill the applause of all, and the unhesitating confidence of our highest judicial tribunal."

From the Law Times.

THE LAW OF AUCTIONS, AND FALSE REPRESENTATION.

We have noticed already, shortly, the very important case of *Warlow* v. *Harrison*, 35 L. T. Rep. 211 [*post*, 670]; but the law which it involves is so extensive that it well deserves to be stated fully for the consideration of our readers.

The following are the facts: — The defendant, an auctioneer, advertised for sale, "*without reserve*," the horse of A. A had fully instructed him to issue the advertisement, and to conduct the sale by public action. At the auction the plaintiff was the highest *bonâ fide* bidder; but A being present, and dissatisfied with the amount of the plaintiff's bidding, immediately made an advance on it. The plaintiff having been informed that A was the owner, declined to bid further; and the defendant thereupon knocked down the horse to A. The plaintiff immediately claimed the horse as the highest *bonâ fide* bidder, and tendered the amount of his bidding; but the defendant refused to accept it, stating that he had knocked the horse down to the highest bidder.

Although these were the facts, the plaintiff had unfortunately, in the court below, declared as on a contract between the defendant, as agent to the plaintiff, to complete the contract of sale, and alleged a refusal to complete it. But the Court of Queen's Bench held that the relationship of principal and agent had not been formed between the plaintiff and defendant up to the moment of the plaintiff's bidding; that the mere acceptance of the plaintiff's bidding did not make the auctioneer his agent; and that until the hammer goes down, there is no contract between the auctioneer and the bidder, who then becomes the purchaser.

The Court of Exchequer Chamber confirmed these principles, although it practically reversed the judgment of the Queen's Bench by amending the declaration, and giving judgment on the facts and merits of the case. In regard to the liability incurred by an auctioneer who advertises to sell "without reserve," MARTIN, B., who delivered the judgment of the majority of the court, said: "We cannot distinguish the case of an auctioneer putting up property for sale upon such a condition, from the case of a loser of property offering a reward; or that of a railway company publishing a time-table, stating the times when, and the places at which, the trains run. Upon the same principle, it seems to me that the highest *bonâ fide* bidder at an auction may sue the auctioneer as upon a contract that the sale shall be without reserve. We think that the auctioneer who puts up property for sale upon such a condition, pledges himself that the sale shall be without reserve; or, in other words, contracts that it shall be so; and that the contract is made with the highest *bonâ fide* bidder, and in case of a breach of it, that he has a right of action against the auctioneer." It is to be observed that BRAMWELL, B., and WILLES, J., while stating that they did not dissent from these principles, gave judgment for the plaintiff on the ground that the defendant had represented that he had authority to sell, without having any such authority. It is therefore to be inferred that these learned judges held the case to fall within the principle of *Collen* v. *Wright*, in Sc. Cam. 30 L. T. Rep. 209, where an action was sustained against the defendant for breach of a contract of sale which he had made in the *bonâ fide* but mistaken belief that he had authority from the owner to sell. There WILLES, J., said, in delivering judgment: "The obligation in such a case is well expressed by saying that the person professing to act as agent for another impliedly undertakes, with the person who enters into such a contract upon the faith of his being duly authorized, that the authority he professes to have does in point of fact exist."

The principle on which the majority of the court avowedly acted in *Warlow* v. *Harrison*, in the Exchequer Chamber, is that which has been applied to the case of rewards advertised for the performance of an act; and of public advertisements by which the advertiser offers to do a certain act on express or implied conditions; and in these

cases it has been held, that an action lies by any person who has fulfilled, or been ready to fulfil, the terms of the advertisement. Thus an action lies for a reward offered for the apprehension of a felon or other offender (*Thatcher* v. *England*, 3 C. B. 254); or for the discovery of a lost child (*Fallich* v. *Barber*, 1 M. & S. 108). But the most remarkable case on this point is that of *Denton* v. *The Great Northern Railway*, 25 L. J. 129, Q. B. There the defendants had advertised in their public time-bills that a train would start at a particular hour. No such train went at that hour; and although it had been dispatched at that time not long before, it had in fact been altogether discontinued during the month in which the plaintiff sought to avail himself of it. It was held by the court that the action would lie against the company, either on the ground that the advertisement amounted to an offer which, when accepted by the plaintiff, constituted a binding contract; or on the ground of an action of deceit for a false representation. CROMPTON, J. preferred to rest his judgment on the latter ground alone, without dissenting from the other judges. This case follows clearly the principle of *Williams* v. *Carwardine*, 4 B. & Ad. 621, where A, by public advertisement, stated that whoever would give information which should lead to the discovery of the murder of B, should, on conviction, receive a reward of £20; and it was held that C, who gave such information, was entitled to recover in an action of contract. The same principle is involved and recognized in *England* v. *Davidson*, 11 Ad. & Ell. 856.

If the principle of *Warlow* v. *Harrison* be followed to its full and apparently necessary extent, it will probably settle a question, which has been raised sometimes, whether a tradesman exhibiting goods in his shop at a fixed price is bound to sell them at that price to any one who tenders the money; and it would seem, on the authority of *Warlow* v. *Harrison*, that the tradesman is bound. On the other hand, this doctrine does not seem to apply when the unaccepted publication or offer contains an express or implied condition which reduces it, from a simple and unfettered offer either, to a conditional offer, or to a mere disposition to negotiate for a contract. It was attempted, in *Denton* v. *Great Northern Railway*, for the defendants, to give this character to the time-table; but the court held distinctly that it amounted to a definite offer. But it is to be ob-

served that in this case the court held the condition by which the company stipulated that they would not be answerable for the delay of the trains to be imported into the contract; and in this respect *Warlow* v. *Harrison* is more extensive, as the court seem to have held that, in the latter case, the plaintiff was not to be held as affected in any way by a condition in the terms of sale, by which it seemed to be contemplated that the sale was not to be absolutely without reserve. On the analysis of these cases, it seems to be clear that a railway company is not liable for delays in the time of the starting of trains, if the company guard themselves, as they generally do, by an express notice in their time-tables, that they will not be answerable for such delays, (cf. *Hughes* v. *Great Western Railway*, 23 L. J. 153, C. P.,) although without such a notice they would be liable, probably, as on an express contract, that the train should start at the specified time. (*Great Northern Railway* v. *Hawcroft*, 21 L. J. 178, Q. B.) It seems, also, that a contract to deliver within a specified time may be inferred from a carrier's ordinary course of business, (*Wren* v. *Eastern Counties Railway*, 35 L. T. 5.;) but without an express contract, or a contract arising out of such usage as in the last case, the carrier is only responsible for negligence in failing to fulfil his common law duty to carry within a reasonable time. (*Raphael* v. *Pickford*, 5 M. & G. 558.)

Supreme Judicial Court. Massachusetts. January Term, 1860. *Suffolk County.*

PEOPLE'S MUTUAL INSURANCE COMPANY *v.* STEPHEN WESTCOTT, ET AL.

Mutual Insurance Company — Election of Directors — Validity of Assessments.

The st. of 1854, ch. 453, § 15, provides that every mutual insurance company shall annually elect, by ballot, not less than seven directors, "and that they shall manage and conduct the business thereof." A similar provision was made in Rev. Stats., ch. 37, § 25, and by § 27, authority was given to fill vacancies by a special election.

Previously to June 12, 1854, the by-laws of the plaintiff

corporation (a mutual insurance company doing business in Boston) provided that "the powers of the company should be vested in twelve or more directors," and that five directors should constitute a quorum. At the regular annual meeting of the company held on the sixteenth day of January, 1854, twelve persons were chosen directors for the ensuing year, and held their offices on the 12th of June following. On the 12th of June a special meeting of the company was held, in pursuance of a call "for the purpose of making alterations in the by-laws, and for the transaction of such business as may come before them." At the meeting thus held, the by-laws were altered by making four directors a quorum instead of five, and seven additional directors were chosen. Four of the seven directors then chosen were the only directors present at a directors' meeting held on the 13th of September, 1854, by which an assessment was made which is the foundation of this action. The company became insolvent, and receivers were appointed, who brought the present suit and many others, to recover the assessment from various policy holders.

Held, that the assessment was invalid, because in the call for the meeting at which the new directors were chosen there was no intimation of any purpose to make such an election, the only specific subject of action named being the alteration of the by-laws. There was no by-law limiting the number of directors, and no new by-law was adopted respecting the number of directors, and no new by-law was adopted respecting the number to be chosen, or altering the time of holding the annual meeting. A measure of much importance to the members of the company, which might transfer the whole corporate power to new hands, could not fairly be embraced in the phrase, "for the transaction of such business as may come before them."

Held, further, that the doctrine of the validity of acts done *colore officii,* although well established by the authorities, was not applicable to this case; as the defendants could not be regarded as third persons in their relation to the insurance company. They were not debtors absolutely to the corporation. By the terms of their contract their liability could only be created by an assessment or call made by the directors, — officers in whose selection they were entitled to a voice. The directors referred to in their contract, were the twelve who were chosen at the annual meeting, and who

held the office on the 13th of September, 1854. No vote to increase the number had been passed at any meeting held for such a purpose. They were not bound to recognize as directors persons who were never lawfully chosen, and who were usurping the functions of an office already filled.

The present case distinguished from *Baird* v. *The Bank of Washington*, 11 Serg. & Rawle, 411, in which a director of a bank was chosen at a meeting at which less than a quorum were present; and it was held that his acts, as an agent and officer of the bank, were valid, as between the bank and third persons.

Whether the power of a corporation to choose directors is not exhausted when, at an annual meeting, a number of directors not less than the number required by law have been elected, — *quære?*

Whether, when the number of directors to be chosen is not fixed by the by-laws, and there is no express authority given by statute to choose directors at any other time than the annual meeting, unless to fill a vacancy, the determination and choice of a particular number at the annual meeting is not to be regarded as fixing the number for the ensuing year, — *quaere?*

Judgment for the defendants.

J. A. Andrew and *Wm. L. Burt*, for plaintiffs.

E. Merwin and *H. C. Hutchins*, for defendants.

CHAS. L. HAYWARD, ET ALS. *v.* ABRAM FRENCH, ET ALS.

Evidence of parties to suit—Death of one of several plaintiffs—Amendment after verdict.

This suit was tried before a jury of the Supreme Judicial Court, at the March Term, 1858. The plaintiffs claimed upon a note dated October 3, 1855, for the sum of $7,500, also upon a dishonored check on the Grocers' Bank, dated November 3, 1855, for $2,500, both signed with the firm name of French, Wells & Co., by the hand of J. B. Kilbourn, a partner in said firm, who deceased, shortly after, by suicide, being a defaulter to a large amount.

The defence was that these instruments were given in fraud of the firm, and that plaintiffs had reasonable cause to know of the fraud. Also, that there was unreasonable delay in the presentment of the check.

The plaintiffs produced the note and check declared on, and after offering evidence of protest and other evidence tending to show that the defendant firm had no funds in the bank at the date of the check, rested their case.

The defendants, the surviving partners, thereupon offered themselves as witnesses, among others, and testified fully as to the facts relied on in defence.

In reply to the proof offered in defence, the plaintiffs were called as witnesses by their counsel.

The defendants objected to their competency, but the presiding judge (BIGELOW, J.) overruled the objection, and the plaintiffs were permitted to testify.

The jury found a verdict for the plaintiffs for the sum of $8,657.08, adding the words, "being the amount of the note and interest thereon," and, upon inquiry by the presiding judge, they stated that they had not been able to agree as to the check. Whereupon the verdict was affirmed as a general verdict, striking out the words added by the jury. The plaintiffs immediately moved to strike out from their declaration the count upon the check.

The defendants filed exceptions to the rulings of the judge, and the case, with the motion above referred to, came up on report.

In argument before the full court, the defendants claimed that Kilbourn was "one of the parties to the original contract" within the meaning of the act of 1857, ch. 305, and, being dead, the plaintiffs should not have been admitted to testify, and that he, being the person who made the contract in suit, and who alone knew what then took place, the case fell especially within the spirit of the proviso.

The plaintiffs contended that the language of the statute contemplated only the legal contracting party on one side in distinction from the opposite contracting party, and that therefore the defendant firm, and not its individual members, was the party to the contract. The plaintiffs further contended that the defendants having offered themselves as witnesses, and having testified fully and at large as to the facts relied on in the defence, were estopped from denying the right of the plaintiffs to testify.

The defendants further claimed that the verdict was wholly bad because the jury found a verdict on one issue only, and disagreed as to the other, and that the motion to strike out the count on the check ought not to be allowed.

Held, that the plaintiffs were competent witnesses; and that the proviso in the St. of 1857, c. 305, "that where one of the original parties to the contract or cause of action in issue and on trial is dead, the other party shall not be admitted to testify in his own favor," is not applicable to the case of a suit brought against a copartnership consisting of three members, one of whom had deceased before the trial, and on which trial the plaintiffs are offered as witnesses. The phrase "one of the original parties to the contract" must be held to mean the legal party to the contract. This must confine the exception to the case of a sole party to the contract on one side, or in case of several joint promisors or copartners, to the case of the death of all the copartners.

That the verdict was properly amended in form to correspond with that prescribed by the rules of practice. It was competent to allow the amendment asked for, discontinuing that portion of the cause of action which sought a recovery on the check on the Grocers' Bank, that being a distinct matter, and such amendment may be allowed at any time before judgment rendered thereon. Rev. Sts., c. 100, § 22. This amendment obviates all objection to the verdict for want of finding all the issues submitted to the jury. It is competent for the court, where there are two distinct causes of action, and a jury find a verdict for the plaintiff on one of them, and state that they cannot agree upon a verdict as to the other, to permit the plaintiff to amend by striking out that portion of his declaration which embraces the claim upon which no verdict is returned, and to allow the jury to return their verdict generally for the plaintiff. *Hall* v. *Briggs*, 18 Pick. 503. *Sowle* v. *Russell*, 13 Met. 436.

Judgment on the verdict.

E. Merwin & R. Codman, for plaintiffs.

C. B. Goodrich & Geo. M. Browne, for defendants.

RICHARD HEALY *v.* THOMAS TRANT.

SAME, *in rev. v.* SAME.

St. 1855, *c.* 405—*Forfeiture of tenancy by nuisance—Sub-lessee.*

Where certain premises had been leased to the plaintiff, and by him had been under-let, and the under-tenant kept a bar and sold liquors, and also kept a house of ill-fame:—

Held, in the absence of proof of any knowledge on the part of the lessee of such use, that his estate in the premises was not forfeited by the St. of 1855, c. 405.

Geo. W. Searle, for plaintiff.

M. Dyer, Jr., for defendant.

Middlesex County.

THADDEUS DAVIS, ET ALS. *v.* GEORGE P. ELLIOT.

Sale of horse with warranty — Tender back and rescission of sale by vendee — Waiver of tender by subsequent use of horse — Value of horse at time of sale, estimated from his subsequent condition — Rule of damages in case contract not rescinded.

This was an action of contract on a promissory note. The answer sets out that the note was given in an exchange of horses made between defendant and plaintiffs, by their agent; that said agent warranted the horse of the plaintiffs to be sound and in good health and condition; that relying upon the truth of said representation defendant gave his own horse and said note for plaintiffs' horse; that plaintiffs' horse was unsound and in ill health and condition at the time of said exchange, and that plaintiffs' agent knew it; that the note was obtained from him by fraud; that there was no consideration for it; that the consideration had wholly failed, and that within a reasonable time after said exchange, defendant tendered to plaintiffs the horse received by him, and demanded back said note and the horse he gave in exchange.

At the trial, much conflicting evidence was introduced as to whether representations amounting to a warranty of soundness were made or not, and if so, whether such warranty was broken.

There was also evidence tending to prove that within a short time after the exchange, after defendant discovered on the horse what he believed to be spavins, he tendered the horse to the plaintiffs and to their agent, and demanded back said note and his horse, and that plaintiffs, and their agent, refused to receive said horse and to give up said note and the horse they received; and that defendant, upon said refusal, took the horse he received of them home, and kept him until the time of trial. It was proved that from the time of said refusal, until the time of trial,

defendant had used and treated said horse as his own, ploughed with him, worked him before cattle, teamed manure from Lowell to Billerica with him, used him alone and in a carryall with another horse, hauled potatoes and apples with him from Billerica to Boston, let him for hire a few times, and generally used and treated him as he did another horse which he owned. Defendant himself testified that he had so used the horse during said time.

When the defendant was upon the stand as a witness, his counsel was permitted, against the objection of plaintiffs' counsel, to put to him the following question: "From what you now know of the condition of the horse at the time of the exchange, what was his value at that time?" The witness in answering the question was requested and permitted, against plaintiffs' objection, to take into consideration the subsequent developments of the spavins, as showing and explaining what was his then condition.

The plaintiffs admitted that the acts done by the defendant above recited, constituted a sufficient tender, and that there was a refusal to receive the horse; but contended that the jury must find either that the contract was not rescinded by said tender, or that the defendant by his subsequent use of the horse must be taken to have waived or lost the benefit of the tender, and could not upon this evidence set up a rescission of the contract, and so requested the court to instruct the jury. But SANGER, J. refused so to do, and instructed them that, if they should find certain facts which would entitle defendant to rescind the contract, the tender made as was admitted was sufficient for that purpose, if they should find that it was made in a reasonable time after the defendant discovered the spavins; and that the contract was thereby rescinded unless there was a subsequent waiver of the tender; that defendant's conduct in using and treating the horse after the tender and refusal would not, of itself, defeat the operation of the tender, and that defendant could not, from the mere fact of such use, &c., be taken to have waived or lost the benefit of the tender, but that it was for the jury to say whether from the proofs there had been such a waiver.

Defendant contended that if the jury should not find the tender to have been made in a reasonable time, still, if they should find that the representations were made, that they were false and known to be so by plaintiff's agent,

and defendant relied upon them as true in making the exchange, they then should inquire into the value of the horses at the time of the exchange, and if they found that both horses were of equal value at that time, that would be a defence to the note; and if they found that the horse defendant received was worth the most, and the difference was less than the principal of the note, the difference between the actual value of the horse, and what would have been his value had the representations been true, should be deducted from the note, and plaintiffs could recover only the balance of the note. And the court so instructed the jury, against the plaintiffs' objections.

The jury found for the plaintiff in the sum of eight dollars, and the plaintiff excepted to the foregoing rulings.

Upon the hearing before the Supreme Court,

Exceptions overruled.

D. S. & G. F. Richardson, for plaintiffs.

Tappan Wentworth, for defendant.

LEWIS JONES plaintiff in error *v.* THE COMMONWEALTH.

Dog.

The keeper of a dog, though he be not the owner, is liable to the penalty imposed by the St. of 1859, c. 225, § 9.

F. F. Heard, for plaintiff in error.

S. H. Phillips (Attorney General), for the Commonwealth.

Supreme Judicial Court of New Hampshire. Rockingham. Adjourned Term.

WALKER AND AL. *v.* CHEEVER AND AL.

Limitation of suits against executors.

If a demand, whether contingent or not, against the estate of the person deceased is not presented to the executor within two years after the grant of administration, it will be barred, unless the administration has been suspended.

It is not enough that the demand was presented within two years after the right of action accrued.

If the executors, by their absence from the State, have

prevented the presentment of the claim, it will not be barred, but a temporary absence, which did not prevent the holder from presenting his claim by the exercise of reasonable diligence, will not extend the time limited by the statute.

No action can be maintained against an executor, which is not commenced within three years after the grant of administration, unless in the case of contingent claims, where the executor shall have been required by a decree of the Court of Probate, to reserve in his hands the necessary funds to meet the claim, when the contingency shall happen.

The ordinary limitation applies to actions against executors, who are residuary legatees and have given bond for the payment of debts and legacies, as in other cases.

LITTLE, ET AL. *v.* GIBSON.

Constitutional law — Adultery — Delivery of deed — Declarations.

An act of the legislature, making parties to pending suits competent witnesses on the trial thereof, is not unconstitutional.

Conviction for adultery does not render a person incompetent to testify as a witness.

Possession of a deed by the grantor soon after its date, is competent evidence upon the question of its having ever been delivered.

The declarations of an ancestor, while possessed of all the rights claimed through him, are competent to be received against the claim made by a party as his heir.

The declarations of the grantor of a deed, alleged to have been procured by fraud and never delivered, may be received to rebut evidence tending to sustain those allegations.

DREW *v.* CLAGGETT.

Auditor's report — Rescission of contract.

The report of an auditor is *prima facie* evidence of the correctness of its findings, and makes a case for the party in whose favor it is, until its conclusions are impeached, controlled, or overthrown by evidence.

When money has been paid, goods sold and delivered, or services rendered, upon an executory contract, and the party receiving the money, or goods, or services, rescinds the

contract, or wholly fails to comply with its requisitions, or refuses to perform an essential part of the entire contract, the injured party, who has paid the money, sold and delivered the goods, or performed the services, has an election, either to bring an action upon the contract to recover damages for its breach, or to consider it as rescinded, and bring his action of *indebitatus assumpsit* to recover the money, the value of the goods sold, or of the services rendered.

Strafford.

ROLLINS *v.* JONES.

When the estimate of damages must be left with the pound-keeper.

A plea to an avowry in replevin that the estimate of damages was not left with the pound-keeper *before or at the time of impounding*, was held bad on demurrer.

It is sufficient that the estimate be left within a reasonable time after the impounding.

PALMER *v.* TUTTLE AND ALS.

Trespass quare clausum — Pleadings.

In trespass *quare clausum*, it is not necessary for the plaintiff to describe his close by boundaries or abuttals, or even by name; and when he has described it, either in the original declaration, or by a new assignment, he is entitled to recover, if he prove a trespass in any part thereof, which he had, or was entitled to have possession of, at the time of the injury proved.

If the plaintiff include in his close as described more or other land than he has the exclusive right to possess, and the defendant would compel him to confine the trespass complained of to that part of the land which actually belongs to him, or else establish his title to the residue thereof, he may plead soil and freehold in himself or another as to all of the close he does not admit the plaintiff to possess, describing it particularly, and as to the residue, the general issue or other plea; this will oblige the plaintiff to new assign the trespass, and either traverse or avoid the plea of soil and freehold, so as to restrict the controversy to the points really in dispute between the parties.

It is not necessary in describing a close by abuttals, to

define the boundary line as indicated by monuments marked on the ground; it is sufficient to describe it as bounded by land in the occupation of others, and leave the defendant, if he claims that any portion of it does not belong to the plaintiff, to define the limit of the plaintiff's right.

Hillsborough.

DODGE *v.* CLARK AND AL.

Costs on failure of demandant's title.

A mortgagee of an estate by the courtesy, who has commenced a writ of entry to foreclose his mortgage, cannot recover costs, where the action fails by reason of the death of the tenant by the courtesy.

CLARK *v* RIDEOUT.

Trover against a mortgagee.

Where a party, who had a mortgage of a pair of steers, took possession of them, under a claim that he was the absolute owner of them by virtue of a sale from the mortgagor, and converted them to his own use, denying then and upon the stand at the time of the trial, that he held or claimed them by virtue of the mortgage, it was *held* that trover could be maintained against him notwithstanding his mortgage, if the jury found there was no sale.

LITCHFIELD *v.* LONDONDERRY.

Evidence — Paupers — Minor children — Verdict.

The exclusion of cumulative evidence upon a point already conclusively proved, furnishes no cause for setting aside a verdict.

A town is not liable for the support of the minor child of a father having his settlement therein, to another town that may support such child, unless such child be actually a pauper; and the child is not a pauper so long as the father has sufficient ability to maintain it.

A father is bound to support his legitimate minor children so long as he has credit or property wherewith to do so, without disposing of what must be immediately replaced in order to enable himself and family to live together.

The verdict of a jury is sufficient, although it be infor-

mal, and do not find in terms the issue submitted to them, if it find the very matter on which the issue depends, and from which it is necessarily concluded.

WALKER *v.* RICHARDS.

Parol promise — Statute of frauds — Declaration.

If the party to whom goods are delivered, or for whose benefit a service is performed, incurs thereby a debt, so that he is liable at all, then the undertaking of another in aid of his liability and collateral to it, must be in writing to be binding, although the collateral undertaking may have been the principal inducement to the delivery of the goods or the performance of the service.

When the whole credit is not given to the person who comes in to answer for another, the promise is collateral and within the statute of frauds.

A collateral promise, though required by the statute of frauds to be in writing, need not be declared upon as being so.

HURLEY *v.* MANCHESTER.

Declaration in suits against towns for damage occasioned by defect in highway.

In a declaration against a town for a special damage happening by reason of a defect in a highway, it is sufficient to allege that there was a public highway, properly describing it, without alleging that it was established in one of the ways authorized by statute.

ROBINSON & CO. *v.* AIKEN & SMITH, & MANCHESTER TR.

Trustee process — Services of mayor of city — "Labor performed."

Official services rendered by a person as mayor of a city at an annual salary are "labor performed" within the meaning of Rev. Sts. c. 208, sec. 9, and the city cannot be charged as his trustee on account of such services rendered after the service of the trustee process or within fifteen days prior to such service.

Merrimack.

JUDKINS *v.* INSURANCE COMPANY.

Stay of execution — Limitation of execution.

The provision of the charter of a mutual fire insurance company, that no execution shall issue upon any judgment against them until three months after the rendition thereof, will be enforced by the court, although the judgment be founded upon a foreign judgment rendered long before.

When judgment is rendered in favor of a member of a mutual fire insurance company, divided into several distinct and independent classes, for a loss by fire of property insured in a particular class, and for which those members alone having property insured in that class are by the provisions of the charter and by-laws of the company responsible, the court will limit the operation of the execution issued to run only against the goods, chattels, and lands, the property and funds of the company belonging to that class.

WOODWARD *v.* PEABODY.

Operation of statute — Liability of indorsers of writs.

Where a statute changes the time of holding a term of court, writs, and executions issued before its passage returnable thereat, become by operation of law returnable to the term as changed by the statute.

The provisions of the revised statutes relating to indorsers of writs, are but a revision and reënactment of pre-existing statutes on that subject.

Where a defendant obtains judgment for costs against a plaintiff not an inhabitant of the State, the indorser of the plaintiff's original writ becomes immediately liable to pay such costs, and *scire facias* may at once be maintained against him without suing out execution upon the judgment.

COUNTY OF MERRIMACK *v.* CONCORD.

Insane asylum—Paupers—Notice of proceedings— Discharge from asylum.

In an action brought by a county to recover of a town sums paid for the support, at the New Hampshire Asylum for the Insane, of a person committed to the asylum by the

Judge of Probate, it is no defence that the town had no notice of the proceedings in the Probate Court.

The town is liable for the support of such person while he is at the asylum under commitment by the Judge of Probate until he is discharged by three of the trustees of the asylum or by a Justice of the Supreme Court.

Grafton.

HAYWARD, ET ALS. *v.* BATH & LANDAFF.

County commissioners — Evidence.

Charges of partiality, corruption, and improper conduct on the part of county commissioners in laying out a highway, unsustained by proof, furnish no cause for setting aside their report.

A contract binding a railroad corporation, having a railroad in operation, to construct a side track at a point on their railroad near the terminus of a proposed highway, within a reasonable time after it shall be constructed, is competent to be received and considered by the commissioners, in a hearing upon the laying out of the proposed highway, as evidence tending to show the probability, that, if the proposed road be laid and built, persons drawing lumber over it will be furnished with railroad facilities at that point.

The Vice Admiralty Court of Lower Canada.

BLACK J.

THE MARTHA SOPHIA.

The non-compliance by a vessel with the Trinity House regulations, as to the exhibition of lights, will not prevent her owners from recovering damages for injuries received from another vessel by collision, if the officers of the latter vessel saw the former and knew her position.

On the 4th of October, 1858, the schooner Diligence anchored at the mouth of the St. Charles, in the harbor of Quebec. The Trinity-House regulations of 1858, then in force, provide that every vessel in such situation shall have at night two distinct lights, one in the larboard fore-rigging, and another on the mizzen peak, or in the mizzen or main

starboard rigging, each twenty feet above the deck. The master of The Diligence, on the evening of the same day, being still anchored in the same place, did not comply with this requirement, but caused one light to be placed in the larboard fore-rigging, less than twenty feet from the deck. While The Diligence was in this position, and while she exhibited this light, at about half past eight o'clock in the evening, the brigantine Martha Sophia, in tow of the steamer St. Louis, came down from Montreal with a full cargo. After passing down the river below The Diligence, and within about eighty feet of her, the tide at the time being at full ebb and running out rapidly, the steamer and brigantine turned up the river against the tide, and passed back, as appeared, about five arpents above The Diligence, when the captain of the brigantine ordered her anchor to be let go, and cast off the tow rope by which she had been towed by the steamer. The Martha Sophia drifting down with the ebb tide, and having no sail set or any other means of controlling her movements, dragged her anchor, and, before it held, came down upon The Diligence, and ran foul of her, doing the damage for which this action was brought. The night was clear, and the master and all on board The Maria Sophia saw clearly the position of The Diligence in passing and repassing her.

The defence mainly was that The Diligence had not complied with the Trinity-House regulations.

Held, that the accident arose from the fault of the master of The Martha Sophia, in miscalculating either his distance from The Diligence, or the strength of the tide, or the time it would take his anchor to hold; and that, as this miscalculation could not be imputed to any fault or negligence on the part of the master of The Diligence, or to the fact of her having but one light instead of two, and that one lower than it should have been to comply with the Trinity-House regulations, the owners of the latter vessel were entitled to recover. If those having charge of the steamer and brigantine had not seen The Diligence, then the non-compliance with the regulation might have been a defence to the action; but having seen her, they were bound to take every precaution against a collision with her, and this whether she was properly or improperly anchored or lighted. Neither by the marine nor by the common law is a vessel or a carriage justified in not taking proper precautions against a collision

with another, by the fact that such other is not in its proper position or side of the road, or is in any way contravening any rule of the sea or of the road. The Diligence might be liable to a penalty for not complying with the regulations, but the collision did not arise from this cause, nor did such non-compliance justify the neglect or error in judgment on the part of the master of The Martha Sophia by which the accident was occasioned.

Kerr and *Lemoine* for The Diligence.

Plamondon and *Dechene*, for The Martha Sophia.

RECENT ENGLISH CASES.

Exchequer Chamber.

WARLOW *v.* HARRISON.

Sale by auction without reserve—By bidding—Liability of auctioneer to the public.

The defendant and one Bretherton were auctioneers, in partnership. In June, 1858, they advertised a sale by auction at their repository, the advertisement containing, among other entries of horses to be sold, this: "The three following horses, the property of a gentleman, without reserve,—Janet Pride, a brown white mare," &c., &c. The plaintiff attended the sale, and bid sixty guineas for Janet Pride; another person immediately bid sixty-one guineas. This person was Mr. Henderson, the owner of the mare. The plaintiff having been informed that the last bidder was the owner, declined to bid further, and thereupon the defendant knocked down the mare to Mr. Henderson for sixty-one guineas, and entered his name as purchaser in the sale-book. The plaintiff went at once to the auctioneer's office, and saw Mr. Bretherton and Mr. Henderson, and claimed the mare from the former, as being the highest *bona fide* bidder, the mare being advertised to be sold without reserve. Mr. Henderson said, "I bought her in, and you shall not have her; I gave £130 for her, and it is not likely I am going to sell her for £63." On the same day the plaintiff tendered to the defendant £63 in sove-

reigns, as the price of the mare, and demanded her. The defendant refused to receive the money or deliver the mare, stating that he had knocked her down to the highest bidder, and could not interfere in the matter. There was evidence that the plaintiff had notice that the following were among the conditions of sale: "1. The highest bidder to be buyer; and if any dispute arise between two or more bidders before the lot is returned into the stables, the lot so disputed shall be put up again, or the auctioneer shall declare the purchaser. 8. Any lot ordered for this sale, sold by private contract by the owner or advertised without reserve, and bought by the owner, to be liable to the usual commission of 2 per cent."

The plaintiff, in his declaration, alleged that the defendant carried on the business of an auctioneer, and as such was retained to sell and dispose of the horse in question, and published and circulated the advertisement before referred to; and that, at the time in said advertisement appointed for the sale, plaintiff attended and became the highest bidder for said mare, and thereupon and thereby defendant became the agent of the plaintiff to complete the contract on his behalf for the said purchase; yet defendant did not complete said contract, but refused so to do, etc., whereby, etc.

The defendant pleaded, — 1. Not guilty; 2. That the plaintiff was not the highest bidder; 3. That defendant did not become plaintiff's agent, as alleged.

At the trial a verdict was entered for the plaintiff, £5 5s. damages, with leave to amend the declaration if plaintiff should think fit. Leave was also granted to the defendant to move to enter a nonsuit. The Court of Q. B. made the rule to enter a nonsuit absolute, and this was an appeal from their judgment.

Held, by MARTIN and WATSON, BB., and BYLES, J., that upon the pleadings as they stood, the judgment of the Court of Q. B. was right, and the defendant entitled to a verdict on his third plea; but that upon the facts of the case the plaintiff was entitled to recover, and that leave should be granted to the plaintiff to amend his declaration conformably to the facts;

That an auctioneer who puts up property for sale "without reserve," pledges himself that this condition shall be complied with, or, in other words, contracts that it shall be

so; that this contract is made with the highest *bona fide* bidder, and that in case of a breach of it, he has a right of action against the auctioneer;

That the case was not affected by the 17th section of the statute of frauds, which relates only to direct sales, and not to contracts relating to or connected with them;

That it was not material whether the owner, or a person on his behalf, bid with the knowledge or privity of the auctioneer, or not;

That although, undoubtedly, the owner might, at any time before the contract with a purchaser was legally complete, interfere and revoke the auctioneer's authority, yet he would do so at his peril; and if the auctioneer had contracted any liability in consequence of his employment and the subsequent revocation or conduct of the owner, he would be entitled to indemnity from the owner. In the present case, *semble*, that the owner's bid was not a revocation of defendant's authority as auctioneer;

That the conditions of sale in the present case (assuming the plaintiff to have had notice of them) did not affect it. As to the first, Mr. Henderson could not be the buyer, being the owner, and (if that is material) known to the defendant to be such. Defendant ought not to have taken his bid at all, but to have refused it, stating as his reason that the sale was without reserve. The eighth condition only provides that if, on a sale without reserve, the owner acted contrary to the conditions, he must pay the usual commissions to the auctioneer.

WILLES, J., and BRAMWELL, B., expressed no dissent to the foregoing judgment; but preferred putting their own judgment on the ground that the auctioneer had no authority from the owner to sell without reserve, and that undertaking so to sell without authority, he broke his contract, and was therefore liable.

Plaintiff at liberty to amend, and proceed to new trial.

HALL *v.* WRIGHT.

On error from the Queen's Bench.

Action for breach of promise to marry within a reasonable time. Plea, that before breach the defendant became afflicted with a dangerous bodily disease, and by reason thereof became and was incapable of marrying without great danger to his life, of which the plaintiff had notice. At the trial, the jury found that all the allegations of the plea were proved, except notice.

On a rule in the *Queen's Bench* to enter a verdict for the plaintiff, ERLE & WIGHTMAN, JJ., were of opinion that the plea was good, and notice unnecessary, and therefore that the defendant was entitled to a verdict. LORD CAMPBELL, C. J., and CROMPTON, J., were of the contrary opinion. The junior judge withdrew, and the rule was discharged.

This was an appeal from that decision.

Held, per WILLIAMS, J., MARTIN, B., CROWDER and WILLES, JJ., that the plea (even supposing notice to be proved) was no defence to the action.

POLLOCK, C. B., BRAMWELL & WATSON, BB., dissented.

This was an appeal from the decision of the Court of Q. B., discharging a rule *nisi* granted pursuant to leave reserved at the trial, to enter the verdict for the plaintiff, on a plea on which the verdict was directed by the judge at the trial to be entered for the defendant.

The declaration stated, that heretofore, to wit, on the 15th of April, 1855, the plaintiff and the defendant agreed to marry one another within a reasonable time in that behalf. And the plaintiff says that although a reasonable time for such marriage has elapsed, and the plaintiff has always been ready and willing to marry the defendant, whereof he has always had notice, yet the defendant neglected and refused to marry the plaintiff.

Pleas: — 1. That the plaintiff and the defendant did not agree as alleged. 2. That the said agreement, before any breach thereof, was mutually rescinded by the plaintiff and the defendant. 3. That after the said agreement, and before any breach thereof, he, the defendant, became, and was, and thenceforth hitherto has been, and still is, afflicted with dangerous bodily disease which has occasioned frequent and severe bleeding from his lungs, and by reason of which disease he, the defendant, then became and was from thenceforth, and hitherto has been, and still is, incapable of marriage without great danger of his life, and therefore unfit for the married state, whereof the plaintiff had notice before the commencement of this action.

Issues were joined on the said pleas.

The cause came on to be tried before ERLE, J., at the sittings in London after Michaelmas Term, 1857, when evidence was given on both sides.

It appeared that there had been an engagement to marry formed between the plaintiff and the defendant early in the year 1855; and that in 1856 a coolness seemed to have arisen, but the engagement was not broken off. Some cor-

respondence which took place in 1856–57 was put in, in which the defendant's religious feelings on the one hand, and the plaintiff's flirtation on the other, were alluded to. About the middle of 1857 the defendant was written to on behalf of the plaintiff to explain his reason for breaking off the match, to which he returned no answer.

There was evidence that the defendant had been attacked with bleeding of the lungs in 1855, and that in the autumn of 1856 he was far advanced in consumption. The medical witnesses expressed it as their opinion that at that time it would have been dangerous to his life to have married, and that any excitement would renew the hemorrhage, and in all probability prove fatal. It did not appear that the defendant knew of his real state; but there was no evidence of his having informed the plaintiff of it.

The jury found the first and second issues for the plaintiff, and the third issue for the defendant, except as to the allegation that the plaintiff had notice before the commencement of the action of the defendant's condition, as alleged in the third plea. They also assessed the damages at 100*l.* contingently.

Thereupon the verdict was entered for the plaintiff on the first and second issues, and for the defendant on the third issue, leave being reserved for the plaintiff to move the court that the verdict on that issue be also entered for the plaintiff.

Afterwards the plaintiff obtained a rule to show cause why the verdict obtained in the cause should not be set aside, and a verdict entered for the plaintiff on the third issue for 100*l.* damages instead thereof, on the ground that the plea was bad; and that the averment of notice was material and should have been proved; or why judgment should not be entered for the plaintiff with 100*l.* damages, notwithstanding the verdict found for the defendant on the third issue.

The Court of Q. B. discharged that rule. Lord Campbell, C. J., and Crompton, J., were of opinion that the third plea was not in excuse or suspension of the performance of the promise; but, admitting a breach, was pleaded in discharge of the promise, and that the contract to marry was not dissolved by the circumstances alleged in that plea, and that the plea was therefore bad. Further, that if the plea was to be taken as pleaded, by way of excuse only, without

treating the contract as dissolved, that it was bad for not averring that before or at the expiration of a reasonable time the defendant gave the plaintiff notice of his state of health. WIGHTMAN and ERLE, JJ., were of opinion that the plea did not admit any breach of the contract as alleged in the declaration, but showed a state of circumstances existing down to the time of plea pleaded which justified the defendant's refusal to marry, and that it was a good plea without any averment of notice to the plaintiff. *Hall* v. *Wright*, 31 L. T. Rep. 297; 27 L. J. Q. B. 345; 22 Law Reporter, 119.

This court being thus equally divided, the junior judge withdrew, and judgment was given for the defendant. From this decision the plaintiff appealed. We give below the opinion of LORD CAMPBELL, in the Queen's Bench, (as it was often referred to in the subsequent stages of the case,) and the opinions of BRAMWELL and MARTIN, BB., in the Exchequer Chamber.

LORD CAMPBELL, C. J. (*In the Queen's Bench.*) — In this case I begin with considering the nature of the defendant's third plea, and what it must be understood to allege. This plea appears to me to be pleaded, not in excuse or suspension of the performance of the promise to marry, but admitting a breach to be pleaded in discharge of the promise; nor does it in substance allege that the defendant could not, without danger to his life, go through the ceremony of marriage, but only that he could not without danger to his life perform the duties of marriage. A contract of marriage, like any other contract, may be shown to be void on the ground of fraudulent misrepresentation or fraudulent suppression. The contract of marriage likewise has peculiar incidents, by reason of which the performance of it may be excused. If subsequently to the contract the woman has been guilty of incontinence, the man, at his choice, is excused from the performance of his promise, which was given under the implied condition that the woman should continue chaste. So if by bodily disease it should become impossible for him, without danger to his health, to go through the ceremony of marriage at the appointed day, giving reasonable notice of this to the woman, or showing something whereby notice might be excused, he might justify the postponement of the performance of his promise. So, if by mental disease he had become incapable

of giving assent in the celebration of the marriage, the woman certainly could maintain no action for a breach of the contract. But here the defendant does not seek to excuse himself for refusing to marry the plaintiff within a reasonable time, giving her notice of the temporary impediment; but considers the contract as *ipso facto* at an end by his supervening bodily incapacity. His plea would, I think, have been proved by evidence that at the time when he ought to have married the plaintiff he had become unfit for the procreation of children without danger to his life.

The question therefore seems to arise whether if, subsequently to a contract to marry, one of the parties, by bodily disease becomes unfit for the most important duty of marriage — the procreation of children — the contract to marry is thereby dissolved, so that the party so rendered unfit being sued for a breach of the contract may establish a defence by simply alleging and proving the supervening unfitness. In support of the affirmative of this proposition there certainly is the high authority of Pothier, one of the most celebrated of modern jurists, who in his Traité de Mariage, part 2, ch. 1, § 61, says, "I am discharged from a promise to marry (de l'engagement des fiancailles) understood in France to be a promise to marry made in the presence of a priest, not only when there happens to the person to whom I am engaged something which, could I have foreseen it, would have prevented me from entering into the engagement; but, still further, I am discharged when something happens to me which, could I have foreseen it, would have prevented me from entering into the engagement. For example, if I become afflicted with some disease which does not permit me to enter into the state of marriage without the risk of injuring my health, as if I become consumptive (pulmonique)." According to this doctrine, the party who so becomes unfit by a tendency to consumption has a right to consider the contract dissolved, the other party wishing the marriage ceremony to be performed; and, the defendant's third plea being sufficient without the allegation of notice, that allegation need not be proved. But the continuation of the same section destroys the authority of Pothier, by showing that the law of France upon this subject is entirely different from that of England; for, having said, "If I become consumptive;" he adds, "or if it be any other disease which disqualifies me from gaining my

livelihood; or if there happens to me a derangement of my fortune which takes away from me the power of supporting the expenses of the marriage which we had promised to enter into; in these and other similar cases I am dispensed from keeping my promise of marriage, which I would not have made if I could have foreseen what would have happened." Pothier himself says elsewhere in the same treatise, p. 8, ch. 1, § 4, "Le commerce charnel n'est point de l'essence du mariage," (of which he gives an example which it would be irreverent to report,) and he recognizes the maxim of Ulpien, *Nuptias consensus, non concubitus, facit.* The only English authority bearing directly upon the question how far a contract to marry is dissolved by supervening disease, is the *dictum* of Lord Kenyon in *Atchinson* v. *Baker*, Peake's Add. Cases, 103: "If the condition of the parties was changed after the time of making the contract, it was a good cause for either party to break off the connection;" but this was said merely *obiter* in a case in which the refusal to marry was on the part of the lady, who, subsequently to her promise, discovered that the gentleman had an abscess in his breast, which he had concealed from her; and the *dictum* in its latitude is not supported by any decision to be found in our books. As yet, there has been no decision that for anything supervening after the contract to marry, unfitting either party fully to perform the duties of the married state, the party so unfitted may treat the contract as dissolved, the other still desiring the marriage ceremony should be performed. We find the general rule upon this subject laid down in *Paradine* v. *Jane*, Aleyn. 26: "When the law creates a duty or charge, and the party is disabled to perform it, without any default in him, and hath no remedy over, then the law will excuse him. But where the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. And therefore if the lessee covenant to repair a house, though it be burnt by lightning or thrown down by enemies, yet he ought to repair it." This is quite consistent with the rule laid down, 1 Roll. Ab. 450, pl. 10: "If a man covenant to build a house before such a day, and afterwards the plague is there before the day, and continues there till after the day, this shall excuse him from the breach of the covenant for not doing thereof

before the day, for the law will not compel him to venture his life for it, but he may do it after." Time not being of the essence of the contract, the existence of the plague might be pleaded in suspension and in excuse of performance of it on that day; but the contract was not dissolved, and if the house had not been built in reasonable time afterwards, the covenantor would have been liable in damages. "So if a man be bound in an obligation to A, conditioned to infeoff B, a stranger, and B refused, the obligation is forfeited, for the obligor has taken upon him to make the feoffment:" (Co. Litt. 209.) This rule has often been applied to mercantile contracts, as in *Baker* v. *Hodgson*, 3 M. & S. 267, where it was held that the charterer of a ship who covenants to send a cargo alongside of a foreign port, is not excused from sending it alongside, though in consequence of the prevalence of an infectious disorder at the port all public intercourse was prohibited by the law at the port, and though he could not have had communication without danger of contracting the disorder. Lord ELLENBOROUGH, C. J.: "Perhaps it is too much to say that the freighter was compellable to load his cargo; but if he was unable to do the thing, is he not answerable for it upon his covenant? The question here is, on which side the burden is to fall. If, indeed, the performance of this covenant had been rendered unlawful by the government of this country, the contract would have been dissolved on both sides, and this defendant, inasmuch as he had been compelled to abandon his contract, would have been excused for the non-performance of it, and not liable to damages. But if, in consequence of events which happen at a foreign port, the freighter is prevented from furnishing a loading there, which he has contracted to furnish, the contract is neither dissolved, nor is he excused for not performing it, but must answer in damages." Is there any reason why this rule should not be applied to the contract of marriage, at least where the ceremony of marriage may be duly celebrated, and the relation of husband and wife thereby constituted between the parties? The counsel for the defendant argued that in his dangerous state of health, as described in the plea, he is in the same situation as if by disease or accident or violence he had suffered mutilation. In that case he certainly could not have maintained an action against the lady for refusing on that account to marry him. But I am

by no means prepared to say that if she had desired to be married by him and he had refused to marry her, he would not have been liable to an action. By such a marriage she could not have become the mother of children; but she might nevertheless have been affectionately attached to him, and might innocently have desired to enjoy the *consortium vitæ* with him; she might have obtained rank and station in society as his wife, and as his widow she might have been dowable of his lands. The defendant suggests the impossibility of entering into the married state under such circumstances; but he may well pay damages for refusing to do so.

If the third plea could be considered as in excuse only, without treating the contract as dissolved, I am of opinion that it is bad, for not averring that before or at the expiration of the reasonable time within which the marriage ought to have been solemnized, the plaintiff had notice of the defendant's dangerous state of health, which constituted the impediment, or at least alleging some reason (as from the suddenness of the illness which overtook) why he did not give her notice. Without any notice to the plaintiff of the defendant's illness, it may not improbably have happened that when the time for the celebration of the marriage approached she made all usual and becoming preparations for her change of condition, and attired as a bride she may even have expected him at the altar to fulfil his vow. The plea merely alleges that the plaintiff had notice before the commencement of the action; and the jury found that no such notice had been given. Indeed, he could not have given her notice, for according to the evidence he was not aware of his danger, and he must be taken to have refused to perform his contract for some other reason. I am of opinion that the action is maintainable, that the plea is bad, that the defendant has not proved a material allegation in the plea, and that the plaintiff is entitled to the damages which the jury have awarded to her. Being equally divided, we must follow what has been the usual course in these cases; the junior judge will be supposed to withdraw, and then there will be a majority of the court in favor of the defendant. Therefore, with a view to enable the parties to take the opinion of a court of error, our judgment will be for the defendant.

BRAMWELL, B. (*In the Exchequer Chamber.*) — In this case the verdict should be entered for the defendant, if so much of the plea as is proved is an answer to the breach of contract complained of. The averment of notice was not proved, but that is immaterial unless the plea with or without it is bad. It is good if it justifies the breach complained of. It is good, therefore, if it justifies the not marrying (for a refusal to marry is not marrying) at the time when, but for the reason alleged, the defendant ought to have married. What are the consequences whether the contract is rescinded, or whether the defendant is liable to marry at some other time, or what else may result, I will advert to hereafter. At present the question is, Does the plea justify the particular breach alleged? Now the plea alleges that before and at the time of the breach the defendant was afflicted by bodily disease, which made him incapable of marriage without great danger of his life, and unfit for the married state. The question was at first argued as to this point of unfitness for sexual intercourse. But Mr. James said it meant, and it appears from the judgment of ERLE, J. it meant, not only that, but also an incapacity to bear the fatigue and excitement of the marriage ceremony. It was proved to be true in both these meanings. I think either matter of justification for not marrying. But it is necessary to examine both, as some seem to consider the plea merely to mean unfitness for the ceremony of marriage; others, the other unfitness I have mentioned. As neither fraud nor illegality is alleged, the excuse for not performing the contract must be found in the terms of the contract itself. The plea, therefore, assumes that it is a term of the contract declared on, that, in the event named in the plea, the defendant should be excused from marrying, and as there is no reason why such term should be in this particular contract, unless it is in all such contracts, the question is reduced to this, — Is it a term in an ordinary agreement to marry, that if a man from bodily disease cannot marry without danger to his life, and is unfit for marriage from the cause mentioned at the time appointed, he shall be excused from marrying then? The plea assumes it is. I think it is. Of course, I admit the parties might stipulate otherwise; but if they do not, I think they are implied terms of the ordinary contract. I quite agree, that where parties can make their own terms, the law ought

not, rightly, to imply any. But there are instances in which it is done from the necessity, or almost necessity, of the case; and if it is reasonable to do it, it is no contract to marry. Consider how it is made, and how it is proved, — made without formality, usually without witnesses; perhaps without the word itself having been used, or any word of contract; an undertaking between the parties, rather than a bargain come to; at least very often in a state when the feelings are much excited; proved by a variety of acts and conduct which assume the contract to exist. It seems unreasonable to deal with it as with a contract for the sale of goods, or other business transaction, though no doubt the same principle governs both. "These contracts should be looked on," Lord Hardwicke said, "with a jealous eye. They are liable to many mischiefs, — to dangerous consequences;" (per Lord Mansfield, in *Low* v. *Pens*, 4 Burr. 2230.) These mischiefs and danger would be greater if the engagement was taken to be unconditional and unqualified. That terms are implied in contracts, is admitted: contracts for personal service for matters dependent on personal capacity, as to write a book or paint a picture, are conditional on the continuance of the ability, mental and corporal, to perform them. This very contract to marry has an implied condition that the woman shall continue chaste; other instances may be given. Similar conditions make one think such conditions, then, as the plea assumes are to be implied in the ordinary contract to marry. Surely if a man said to a woman, "I have promised to marry you, I must and will, but will never live with you or treat you as a wife," he would not be offering, but refusing to perform, his contract. (*Leeds* v. *Crook*, 4 Esp. 256.) The contract is a contract to marry and perform the duties of marriage. I think it better to recognize what we all know exists, and to assume it exists for a good purpose, than to affect to ignore it. Besides, there is abundant warranty for so doing. The marriage of an impotent man is null; and two of the three reasons for matrimony given in the marriage service involve a capacity for sexual intercourse. Can it be doubted, then, that if death were the certain result of the fatigue and excitement of the ceremony, the defendant would be excused; or that impotency supervening on the promise would excuse him? Could he be bound, in performance of his promise, to commit suicide, or go through

a ceremony which would be a nullity? But if the certainty of a fatal result would excuse, so would great danger of it. If impotency would, so surely should great danger; death from the exercise of capacity, more so. But to possess the lawful means of gratifying a powerful passion, with the alternative of abstaining or perilling life, is indeed "to incur the risk of intense misery instead of mutual comfort;" and it does seem to me, with great respect, a great mistake to lose sight of these considerations, and suppose happiness can be procured in such a marriage by the gratification of an innocent desire to enjoy the *consortium vitæ* with a man, obtain rank and station as his wife, and be dowable of his lands. Moreover, am I to think only of the woman, and not of the man, who might object that her wishes, however innocent, were very unreasonable towards him, in wishing him to put himself in the temptation of perilling his life; and he might even doubt the innocence of such a desire, certainly, of wishing him to go through a ceremony which might be fatal to him. This suggests the following: If the man is not excused, but bound, is the woman bound in such a case? Impossible, one would think. But if not, it must be on account of some implied condition in the contract. It is not as though the man was in default. She could not refuse to marry in such a case on the ground that he had broken his contract by not continuing fit for marrying; for if so, she might not only refuse to marry him, but maintain an action against him for becoming unfit. That cannot be. He does not thereby break his contract. Yet she is excused. If so, so must he be; for if without default of one party to the contract the other has a right to refuse to perform, on the happening of a certain event, it must be assumed, till the contrary appears, that the right is common to both. If in such a case she could rely on an implied condition to excuse her marrying him, why may not he on one to excuse his marrying her? The contract of marriage has been assimilated to those to which it bears no resemblance. A man contracts to build a ship, and cannot. Well, that is his misfortune; a loss will be sustained by him, or the ship-owner, and it is convenient that, if he puts no condition on his contract, none should be implied; and that, if his contract is conditional, he should bear the loss consequent on his non-performance. If so, also of a contract to sell corn. But in the case of a contract to marry

with supervening impotency, there is a loss which must fall on both, whether the contract is fulfilled or not. It seems to me, then, that sexual intercourse is contemplated by parties who agree to marry, as an essential part of their engagement. The inability for it in one party is an excuse from performance by the other, — that, where such excuse exists without any default in the disabled party, it is contrary to principle to hold that an option is given to the other; consequently that the right of secession in such a case is mutual. The authorities are in favor of this view. (Pothier, Traité du Mariage, Part 2, c. I. Art. 761.) But it is said his authority is impaired by his adding, as a cause of dissolution, "a derangement of fortune, which put him out of condition to be able to support the charges of the marriage which he had promised to contract." I own I see nothing unreasonable in this, nor anything very different from our law. People who agree to marry, not having the means, agree with the implied condition to wait till they have them, — the legal expression of which is, that their engagement is to marry in a reasonable time, and that does not arrive till their means are sufficient. Suppose, after the engagement, poverty falls on them; that is an excuse for not immediately marrying. Is it reasonable that the woman should wait till the man becomes able to maintain her? This reasoning may be wrong; still, there is Pothier's authority direct on the question in hand. Then there is the opinion of Lord Kenyon, in *Atchinson* v. *Baker*, in Peake, cited and approved in 1 Parsons on Contracts, 550. *Parradine* v. *Jane*, and similar cases cited for the plaintiff, are misapplied. They beg this question. No doubt, if the contract made by the parties is unconditional, death or disease is no excuse; but the question in this case is, whether the contract is not conditional on the continuance of life and health. Why, if the defendant died before breach, could not his executors be liable? The answer is, because he has not undertaken to live; neither has he to continue competent in health; and the one is as much a condition of matrimony as the other. This disposes of *Barker* v. *Hodgson*. Lord Ellenborough remarks: "Perhaps it is too much to say, 'the freighter was compellable to load the cargo,' does not mean he was excused from so doing; for the plaintiff recovered in respect of the defendant not having done so. The damages were for breach of the covenant to do it."

What Lord Ellenborough means, I imagine to be, that the defendant was not compellable, or would not have had specific performance enjoined. It is to me unintelligible how, if the man is not bound to perform the contract, he can be liable to pay damages for its non-performance.

But it is said notice ought to have been given to the plaintiff. In point of right feeling I agree; but the parties here are at law with each other. The defendant says, "I have a legal answer to your legal demand." As a rule, a man is not bound to say why, and I see no reason why he should in this case of a contract to marry. It may be the defendant communicated to the plaintiff in the most delicate way an objection to marry, but refused to say why. If she chooses to go to law with him, as on a bargain, she must abide by the rules of law applicable to all cases of bargains and contracts. I understand the opinion of CROMPTON, J. to be rather as above expressed, with this difference: he thinks that, at the utmost, all the defendant was entitled to, was to rescind the contract. But, if so, I think the plea is good. When is he to rescind? If a contract gives a right to rescind it, but expresses no time for rescinding, it need not be done till the time arrives for performance; no previous notice need be given. In truth, such a right to rescind is a right to say "no" when the time arrives for performance. It may be that a person who rescinds must give notice; but when? He does give notice when he refuses; is he bound to give it earlier, — if so, why? In the not very probable case of the lady going to the altar without previous arrangement, surely he might, if afflicted as the defendant is, fairly send word, in answer to the invitation to join her, that he would not. In the more probable case of some previous request, he refuses when it is made; in other words, till he refuses there is no breach of contract, and when he refuses, he by so doing gives notice that he will not perform. Is he bound to say why? I cannot understand why he is. No doubt, if after his disability arises he goes on with the engagement, he may well be bound, as that would be evidence that the original contract was not conditioned as I think ordinary contracts to marry are, or would furnish evidence of a fresh contract. Further, if it is said that the facts proved only justify a postponement of marriage, I think the plea good. The plaintiff complains the defendant refused; the defendant says,

"When I did, I had a sufficient reason." I do not understand the breach to be "you refused, and refused forever." I do not understand such a breach in point of law. I do not understand what is meant by a plea "in excuse or suspension of the performance," as distinguished from "or in discharge of the promise." *Hochster* v. *De La Tour* turns on the relation of master and servant. If I contract to do a thing and am sued for not doing it, it is a good defence to say the time for doing it has not arrived, and I take it it would be a bad replication to say, "True, but you said you would;" (see *Avery* v. *Bowden*.) The plaintiff can only be entitled to recover on these pleadings and proof on the ground that the asserted and proved incompetency is no ground for refusing to marry when the request so to do is made. I am of opinion it is. In short, the defendant here says: "You complain I refused; I admit that I did so for a good reason, namely, my performance was conditional on my continuing in a competent state, and I ceased to be so." If the plaintiff meant to say the contract was not so conditioned, she should have given evidence, in my opinion, that the contract in this case was not of the ordinary contract to marry. If she meant to say there was a new contract evidenced by the engagement continuing after the disability was known, she should have new assigned. But if she relies on and proves the common contract only, it is in my opinion a good answer to prove that the defendant, when he refused, labored under either of the infirmities mentioned in this case. If I am to say whether I think the contract ended by such an event, I say I do, and on this ground — that it is so vitally for the benefit of both parties that that should be the agreement between them, that common sense requires it to be so implied. The disability of the defendant, if not incurable, was one of indefinite duration, and of a lasting character. Had it been that he broke a leg, or was afflicted with a fever which disabled him from marriage at the time appointed, I should have thought him not liable to an action for not marrying then, but bound to marry on his recovering. This last consideration seems to me to suggest an argument in favor of the contract being conditional as suggested; for in ordinary contracts, if not liable at the day appointed, the person would not be at another time; but in this contract it is absurd to suppose that, if a day was named for a marriage, and the man broke his

leg, was ill of a fever, lost a parent, or from some other consideration of health or decency could not marry on the day in question, he would either be liable to an action, or wholly discharged from the promise to marry. But the same good sense and convenience which would reject such a conclusion would, in my judgment, require that the contract should be construed with the conditions I attach. For these reasons, as well as those of WIGHTMAN, J., and ERLE, C. J., I think the judgment of the court below should be affirmed.

MARTIN, B. (*In the Exchequer Chamber.*) — I agree with Lord CAMPBELL and my brother CROMPTON, and think the plea not good. The law of England permits an action to recover damages for the breach of the promise to marry, although I am aware that many persons think such an action should not be allowed. The action is not for the specific performance, — a suit which I apprehend no court in this country would entertain, —but for damages for the non-performance of the contract. The plea is one in confession and avoidance of the facts alleged in it, (exclusive of the notice to the plaintiff.) He ought to excuse or justify the breach. The judges of the Court of Queen's Bench do not seem to have been agreed as to the exact meaning of the plea. But, to put it in the most favorable way for the defendant, it may be assumed that the promise to marry involves the promise to consummate the marriage, and that the incapacity and danger to life mentioned in the plea has been caused by an inevitable misfortune, without any act or conduct of the defendant conducing to it. The general rule upon the subject is, that when a person by his own contract creates a duty or charge upon himself, he is bound to make it good if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract: *Parradine* v. *Jane*, Aleyn Rep. 27, cited and acted on in *Hadley* v. *Clarke*, 8 T. R. 259, and *Atkinson* v. *Ritchie*, 10 East. 530. See also Co. Dig. "Assumpsit" G.; and I know of no authority except it be *Lawrence* v. *Twentyman*, 1 Roll. Abr. 480, R. 10, having any tendency to shake it, or to show that such a state of facts as alleged in the plea is an answer to an action for pecuniary damages for the breach of a contract to marry. I think it very much better to adhere to the rule than to create an arbitrary exception, for which, no doubt,

plausible reasons may be given. To admit exceptions of this kind utterly destroys the certainty of law, and in my opinion is inconvenient.' But in the present case, what the defendant promised to do was to marry the plaintiff, and this he could have done. It is quite consistent with the averment in the plea that the incapacity and danger to life may have been caused by the defendant's own acts or conduct; and a case will rightly suggest itself where, after an agreement to marry, an incapacity to consummate marriage and danger to life in attempting to do so, might arise in which it would seem absurd to suppose that damages could not be recovered. The supposed objection of the plaintiff would be the grossest aggravation of the cause of action. As to *Lawrence* v. *Twentyman*, except it be explainable in the manner suggested by Lord CAMPBELL in his judgment in this case, — namely, that time was not of the essence of the contract, or that the law relating to holding intercourse with persons affected by the plague (1 Jac. 1, 13), made the performance of his contract illegal, — I cannot agree with it. It is no doubt referred to in several books of authority; but, unless explained by others, it seems contrary to the rule of law. The *placitum* is to the effect that a man had contracted to build a house before a given day, but was excused because the plague had broken out and continued to the day in the very neighborhood; but it is added, he must build it afterwards. Unless the contract really was to build the house within a reasonable time, or the statute of James made the building illegal, (in which case, the decision, by reason of the existence of the plague in that neighborhood, was right,) this case cannot be sustained. How is it possible to maintain covenant by any obligation to build it afterwards? The builder never contracted to do so, and the common law could not impose such a contract upon him: (see Shepherd's Touchstone by Preston, p. 174; and *Barker* v. *Hodgson*, 3 M. & S. 267, which seem to the contrary.) It must be that the law deems the contract to marry to be one of pecuniary value, and assuming that it could not reasonably be enforced under the circumstances stated in the plea, that the defendant should marry the plaintiff, I can see no reason why he should not compensate her for the breach of the contract. Why should the consequences of the mistake fall upon her, and not upon the defendant? (See Lord Ellenborough's judgment in *Barker* v.

Hodgson, and the *dicta* of Lord Holt in *Thornborrow* v. *Whiteacre*, 2 Ld. Raym. 1164.) For these reasons I think the judgment of the court below ought to be reversed.

WILLES, CROWDER, and WILLIAMS, JJ. concurred with MARTIN, B.; and POLLOCK, C. B. and WATSON, B. with BRAMWELL, B. Thus the judgment of the Court of Queen's Bench was reversed, and

Judgment given for the plaintiff.

Crown Cases Reserved.

REGINA *v.* CHARLOTTE ADAMS.

False pretences.

The defendant was indicted for falsely pretending that a piece of paper was a bank note then current, good and of the value of five pounds, by which false pretences she did unlawfully obtain from one Mary Miles certain money with intent to defraud; whereas, in fact, the said piece of paper was not a bank note then current, or of the value of five pounds, or of any value whatever, as the said Charlotte Adams at that time well knew.

The facts were that the prisoner tendered to the said Mary Miles a five-pound note of a bank which had stopped payment, and obtained change to the full amount. At the close of the prosecution, it was objected, on the part of the prisoner, that there was no proof of the allegation in the indictment that the note was not good, or of the value of five pounds, or of any value. The magistrate told the jury that he thought there was some evidence from which they might infer that the note was not of any value. The jury found the prisoner guilty.

Held, that the question was not properly left to the jury; that the question of value was an immaterial one, and that simply producing the note and leaving it to tell its own story, did not constitute a false pretence, and that therefore the conviction could not be sustained.

Exchequer.

TAYLOR *v.* BURGESS.

Promissory note — Principal and surety — Giving time to principal — Equitable defence.

Action on a promissory note. Plea, on equitable grounds, that the note was made jointly with B. for his accommoda-

tion, and as security for him, and that the note was given to the plaintiff on the agreement that defendant should be liable as surety only, and that the plaintiff had notice that he was surety only; that the plaintiff, afterwards, without defendant's knowledge, gave time to B. for valuable consideration, but for which he might have obtained payment.

Held, (on the authority of *Pooley* v. *Harradine*, 7 E. and B. 431,) that though the absolute written contract between defendant and plaintiff contained in the note, could not be varied by parol in equity any more than at law; yet an equity arose from the relation of surety and principal between defendant and B., and the notice thereof to plaintiff at the time he took the note; and therefore that the plea was good.

Thompson *v.* Ross.

What service is sufficient to support an action for loss of service by seduction.

The plaintiff brought the present suit to recover damages for an alleged seduction of her daughter, who was a domestic servant of the defendant's father. The plaintiff had a contract for making shirts, an employment in which she had been engaged for some time. Her daughter, in the evenings after she had finished her work for Mrs. Ross, her mistress, used to help her mother (with her mistress's knowledge and consent) in the making of these shirts. The alleged seduction took place when she was thus the domestic servant of the defendant's mother, occasionally occupied for her own mother in the making of these shirts.

A verdict at *nisi prius* was rendered for the plaintiff, damages £50, with leave reserved to move for a rule to set the same aside and for a nonsuit.

Pollock, C. B. I am of opinion that this rule should be made absolute. There was really no service in this case rendered by the daughter to the plaintiff that can enable her to support an action, even such an action as this against the defendant, for what is called the loss of service. Slight evidence of service would do, no doubt, but then it must have been a true, genuine service, such as a master or mistress may command. This was, to make the most of it, but a mere helping of her mother, with the consent of the lady who was at that time her real mistress. Suppose a

female domestic servant, on a Sunday evening, was permitted by her master and mistress to go home, and went, and when there made her father's tea; that would be a similar case, but surely not enough to constitute such service as would enable her father to maintain an action of this kind as for the loss of service. Here the service performed for her mother might, at any moment, have been withdrawn from her mother by her master or mistress, and Mrs. Ross could have claimed her entire time. It may be a hard case on both mother and daughter; but I do not think the service of the daughter to her mother is here sufficient, under the circumstances, to enable the plaintiff to support this action, and the result is that a nonsuit should be entered.

BRAMWELL, B., concurred, saying: I do not mean to say that a person may not agree to render service to one person for one part of a day, and perform other service for another at a different part of the day, and that either of such services may be sufficient to maintain an action on an occasion of their loss; but here there was no evidence of any such special contract, and in this case the plaintiff's daughter was the entire servant of Mrs. Ross altogether.

WATSON *and* CHANNELL, BB., concurred.

KENNEDY *v.* HILLIARD.

Libel.

Held, that no action for a libel, lies on the contents of an affidavit made in a judicial proceeding, whether the contents of the affidavit be relevant to the matter in issue or not, nor even where the alleged libellous matter has been expunged by order of court.

Court of Appeal in Chancery.

PIGGOTT *v.* STRATTON.

Lease — Surrender — Covenants — Representation.

S. having a building lease for 999 years, by the covenants of which he was restricted in the mode of building on the land, sub-let a part of it to H., at the same time informing him that he was restricted by his lease from building on the other part of the land in such a manner as to obstruct his (H.'s) sea-view. S. also covenanted to observe the cov-

enants in the original lease. After the sub-lessee had erected houses on his portion of the land, S. surrendered the original lease, taking another which did not contain the restrictive covenants. He then began to build on that portion of the land which by the covenants in the original lease he was restricted from doing. On a bill filed for an injunction to restrain him,—

Held, (affirming the decision of Wood, V. J.,) that S., having stood by while the sub-lessee laid out money on the faith of the representations he had made, could not be allowed to obtain an increased benefit to himself by surrendering his lease, so as to enable himself to obstruct the sea-view of the sub-lessee; and that, having covenanted to observe the covenants of the original lease, it was the same as if those covenants had been inserted at length in the under-lease.

Monypenny v. *Monypenny*, 4 C. and J. 174, approved.

OBEE *v.* BISHOP.

Breach of trust — General accounts — Arrears of rent — Statute of limitations — "Express trust."

A testator by his will gave his freehold and leasehold estates and the general residue of his personal estate to his son G., and appointed H., his widow, his sole executrix. G. died in March, 1838, intestate, leaving two sisters (B. and S.) and a niece, his co-heiresses-at-law, and they with his mother were his sole next of kin. The mother took out administration to her son, and died in 1841, leaving a will, under which her daughter B. was sole executrix and sole legatee. In December, 1858, B. took out administration *de bonis non* on G.'s estate, and three days afterward, more than twenty years after the intestate's death, the niece and her husband filed the present bill to recover her share of the real and personal estate of the intestate, which had never been paid to her, and to have the real and personal estate administered.

Held, (confirming the decision of STUART, V. C.,) that the plaintiff was entitled to an account of the rents of the real estate only for a period of six years before the institution of the suit, but that the statute of limitations was no bar to an account of the personal estate and of the rents of the leasehold estate received by the original administratrix or

by her executrix from the period of the death of the intestate.

Where a breach of trust is committed by a person who holds property as an "express trust," his assets in the hands of his personal representatives continue liable to the persons interested in the subject of the trust, even after the lapse of six years from his death before claim preferred.

Vice-Chancellor Stuart's Court.

COWDRY *v.* DAY.

Solicitor and client — Mortgage — Restriction upon redemption for a period of twenty years.

By a deed of mortgage entered into between a solicitor and his client, it was stipulated that the debt should remain on the security of the hereditaments for twenty years, and the client covenanted that he would not pay or tender payment of the sum, or institute proceedings for the redemption of the lands for that period. There was a power of sale, which was not to be exercised until the expiration of the twenty years, or until two months' default should have been made in the payment of interest.

Held, that such a clause as that in question being a contract between a solicitor and his client, if it has an effect in any material degree prejudicial to the ordinary rights of a mortgagor, and is unusual in its terms, the solicitor, in order to sustain such clause, must show that the client had sufficient advice and assistance from other persons to relieve him from the pressure arising from the relation of solicitor and client; that there was very little doubt, in the present case, as to the injurious effect of the clause upon the interests of the client; as tending to keep him and his estate in the hands of the solicitor, making it difficult, if not impossible, for him to borrow any further sum on the security of the estate from any other person than the solicitor, or on any other terms than the solicitor prescribes, as tending to fetter the client in his right to change his solicitor, and thus as being contrary to public policy; that in this case the respondent had not shown that the complainant had, as his client, sufficient advice and protection from other persons in the transaction.

Whether, independent of these considerations, if the mortgagee had not been the solicitor of the mortgagor,

the court would decree the redemption of a mortgage containing such a stipulation as appeared in the present case, — *quære?*

GILES *v.* HART.

Covenant by surgeon and apothecary not to practise within five miles of a certain town — Injunction.

The defendant agreed to act as assistant to the plaintiff in his business of surgeon and apothecary, and by deed covenanted with the plaintiff that he would not at any time after he should cease to act as the plaintiff's assistant, and, whether said indenture should be in other respects determined or not, carry on or exercise the profession and business of a surgeon and apothecary in the town of C., or within the compass of five miles therefrom. The deed contained a proviso that it should be lawful for the defendant by giving one month's notice, to determine the indenture and the covenants and agreements therein contained, subject, nevertheless, and without prejudice to any rights of action which might have accrued, or which might accrue thereafter, to the plaintiff, by virtue of these presents, and for the true performance of the covenants thereinbefore contained, on the part of the defendant, not to carry on the profession or business of a surgeon and apothecary at C.

The defendant, by due notice, determined the indenture, "and the covenants and agreements therein contained," and then proceeded to practise as a surgeon and apothecary at C.

Injunction to restrain the defendant granted in the terms of the above covenant.

Vice-Chancellor Kindersley's Court.

BARBER *v.* BARBER.

Pleading — Demurrer.

The respondent demurred to the complainant's bill, the terms of the demurrer being, that said complainant had not by her said bill made such a case as entitled her, in this court, to any discovery or relief. The demurrer thus comprised two grounds: first, want of equity; and second, by the words "in this court," want of jurisdiction. The main point relied upon in support of the demurrer was, that the

complainant omitted in her bill to state a number of facts which it might be material to consider when the case came on for hearing.

Held, that, as a demurrer must be founded on facts alleged by, and appearing on, the bill, if any facts are not alleged in the bill of which the respondent desires to avail himself, his proper course is not to demur to the bill, but to plead those facts, and on the facts so pleaded to ground his defence.

Demurrer therefore overruled.

It seems, also, that the ground of want of jurisdiction ought to be made the subject of a distinct demurrer, and should not be incorporated with want of equity in one demurrer.

Vice-Chancellor Wood's Court.

EVANS *v.* CARRINGTON.

Divorce — Marriage settlement.

Where the English Divorce Court has dissolved a marriage, a court of equity has no jurisdiction to entertain a suit to declare void or vary the provisions of the marriage settlement.

Rolls Court.

PASCOE *v.* SWAN.

Occupation by one tenant in common—Infancy of the other tenant—Entry.

Where there were two tenants in common, one of whom (the plaintiff) was an infant when his title accrued, and the other (the defendant) had been in actual occupation of the property at the death of the infant's mother, the former tenant in common, and had continued in such occupation during the infancy of the plaintiff,—

Held, that the occupation of the defendant was an entry on the estate of the infant, and therefore that he was liable to account for rents and profits, under the statute of Anne, although he had not received any rent, and that he must pay an occupation rent.

HAINES *v.* BURNETT.

Agreement for a lease, with conditions—Covenant not to assign.

A memorandum of agreement for a lease contained a

stipulation that the lease should contain a covenant that the lessee should not assign unless to a person approved by the lessor, and also all usual covenants. The draft lease contained a condition that the lease should be determined by the lessee becoming bankrupt or insolvent, or making an assignment for the benefit of creditors, or in the event of an execution being levied under a judgment against the lessee.

Held, that the conditions in the draft lease were warranted by the stipulations contained in the memorandum which prohibited assignment without license.

Exeter Quarter Sessions.

MOORE *v.* GARDINER.

Turnpike tolls and the Rifle corps.

Mr. Gardiner, the lessee of the turnpike tolls, and a member of the Exeter and South Devon Rifle Corps, was summoned by Captain Moore, of the first company of the battalion, for illegally taking toll, on the 9th January inst.

Toby appeared for the defendant; Mr. Moore conducted his own case.

Mr. Moore said this information was laid under the 3 Geo. IV. c. 126, § 32, which exempted from toll all carriages carrying infantry volunteers to and from any place of drill, muster, or inspection, or occupied in any other duty, in accordance with the regulation of their corps.

Mr. Moore was then sworn, and stated that he was the captain of the first company of the Exeter and South Devon Rifle Battalion, which was an infantry corps. On the 9th January inst., he, in company with two other officers of the corps, in full dress, were proceeding towards Exmouth in a hired carriage. On passing through Mount Radford gate, on the Topsham road, he drew up, and said to the toll-collector, "I claim exemption as belonging to a company of infantry volunteers, and being in uniform and armed." The collector said he must have the toll, which was a shilling. Complainant said he would pay it under protest, which he did. He was on his way to Exmouth on duty. The Woodbury and Topsham Artillery were inspected there on that day, and the Exmouth Rifle Corps were also under arms. Complainant went to take part in the proceedings of the Rifle Corps.

Cross-examined by Toby.—The two officers in the carriage with him were Lieut. Vallance and Ensign Clarke. All were in full uniform. The rifle company was formed under the 44 Geo. III., and acted solely under it, with the exception of certain regulations since framed by the War Office. The Exmouth Company of Rifles were a portion of the Exeter Battalion; but they had their own captain and officers. He did not go down for the purpose of witnessing the artillery inspection, but to take the command of the rifles as senior captain. He had no command to go, but he had heard from Sir Edmund Prideaux that the Rifles would be under arms that day. He was not invited by Captain Brent, of the Artillery Company. Both the other officers were not seniors, and had no commands to go to Exmouth. They were bound to obey their commanding officer.

Toby then addressed the bench for the defendant. The Rifle Corps were, he submitted, framed under the 44 Geo. III. § 13, c. 54, which exempted field officers when on duty from the toll, provided they had their accoutrements; but he contended that they must be on horseback; and that the act which had been quoted by Mr. Moore did not apply at all in this case. That act related to a company ordered on the march, and where carriages were used for the conveying of baggage, etc. Any officer in the Rifles might put on his uniform and hire a carriage, and say he was free from toll, according to the complainant's ruling. The magistrates had decided, in the case of the Yeomanry Cavalry, that where they sent on their horses and baggage, and rode together in a trap, they were liable to pay toll. This was, he contended, a similar case: if Mr. Moore had been on horseback, he admitted he would have been free from toll. But then arose the question, Were they all on duty? If the magistrates decided against him on his ruling of the law, he (Mr. Toby) argued that, although Captain Moore (as senior captain) might have a right to go to Exmouth, the other officers were not seniors, and were under no commands, and therefore toll was legally due, they being in the carriage.

Mr. Pitman asked Mr. Moore if the other officers were on duty.

Mr. Moore.—I desired them to accompany me.

Mr. Davy said a desire was not a command.

The magistrates retired for consultation, and on their return into court,

The Chairman said the bench were of opinion that toll was legally payable in this case.

Mr. Moore said the question was one of great importance, as deciding a principle; and, as the question would probably be fought in another court, he should feel obliged if the magistrates would state on what grounds they had decided the case.

Mr. Drake (magistrates' clerk) said the bench did not consider that the present was a carriage conveying volunteer infantry within the meaning of the exemption mentioned in the act.

NOTICES OF NEW PUBLICATIONS.

REPORT OF THE CASE, PEOPLE v. WILLIAM TYLER: decided in the Supreme Court of Michigan, October, 1859. By T. M. COOLEY, State Reporter. Detroit, 1859.

This is the report of an important case turning upon the construction of the Act of Congress of March 3, 1857, in addition to an act more effectually to provide for the punishment of crimes against the United States.

The defendant was indicted in the State Circuit Court of Michigan for St. Clair County, for the murder of one Henry Jones, and the indictment set forth that said Jones was wounded by a pistol bullet, shot by defendant on board the brig Concord, then and there being on the river St. Clair, on navigable waters without the limits of the State of Michigan, from which wound the said Jones afterwards, in the City of Port Huron, in said County of St. Clair and State of Michigan, did die. The clause of the statute of Michigan, under which the indictment was framed, is as follows: "If any . . . mortal wound shall be given, or other violence or injury shall be inflicted, or poison administered, on the high seas, or on any other navigable waters, or on land either within or without the limits of this State, by means whereof death shall ensue in any county thereof, such offence may be prosecuted and punished in the county where such death may happen;" and there was no question that the State court had jurisdiction of the cause, unless it was concluded by the facts set forth in the following plea:—

The defendant pleaded to the indictment that theretofore, to wit: at a special term of the Circuit Court of the United States for the District of Michigan, begun and holden, &c. he, the said defendant, was indicted, convicted of manslaughter, and sentenced, for the same offence as that charged in the present indictment, and had subsequently served out the imprisonment and paid the fine then imposed upon him; that the said Circuit Court of the United States for the District of Michigan, had full power, authority, and jurisdiction to try said offence under the act of the 3d of March, 1857, which enacts "that if any person or persons upon the high seas, or any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of any particular State shall, unlawfully and wilfully,

but without malice aforethought, strike, stab, wound, or shoot at any other person, of which striking, stabbing, wounding, or shooting, such person shall afterwards die upon land within or without the United States, every person so offending, his or her counsellors, aiders, and abettors, shall be deemed guilty of the crime of manslaughter, and upon conviction thereof shall be punished," being tried in the United States Circuit Court, as is further provided in said act; wherefore the defendant ought not now to be held to answer to the same cause of action.

The prosecuting attorney for replication to the plea, admitting the fact of indictment, trial, sentence, and conviction by the Circuit Court of the United States, to be true as set forth in the plea, set up that the shooting charged was done beyond the boundary line between the United States and the province of Canada, and within the geographical boundaries of said province, and of the County of Lambton in said province, without the limits of the United States, and without the boundaries of the State of Michigan and of the County of St. Clair, and without the admiralty jurisdiction of the United States.

To this replication defendant demurred, and the prosecution joined in demurrer.

And thereupon the circuit judge reserved for the opinion of this court the following questions: —

First. Had the United States, at the time of the said conviction and judgment, admiralty jurisdiction over that part of the waters of the river St. Clair, which is without the boundaries of the United States, and within the boundaries of the County of Lambton, in the province of Canada, within the intent and meaning of the act of Congress entitled, "An Act in addition to an Act more effectually to provide for the punishment of crimes against the United States, and for other purposes," approved March 3, 1857.

Second. Was the shooting of Henry Jones, by the defendant, in the manner, and under the circumstances set forth in the said plea and replication, and in the place set forth, in the said replication, within the admiralty and maritime jurisdiction of the United States, for the seventh circuit and district of Michigan, under the said first section of the act of Congress aforesaid?

The case was very thoroughly argued on these points, as appears from the report, and all the judges delivered elaborate opinions, except MARTIN, C. J. who briefly expressed his views. They unanimously answer both questions in the negative; and thus deny that the Circuit Court of the United States had any jurisdiction over the case, and regard the conviction by that court as *coram non judice*, which of course could not bar a subsequent indictment for the same cause.

The questions thus considered and determined are of much importance, especially in that portion of the country bordering upon the great lakes. From the action of the Circuit Court of the United States in taking cognizance of the indictment brought in that court, it is hardly to be inferred that that court formed an opinion adverse to that arrived at by the State court, as the points were not made in the Circuit Court of the United States, and jurisdiction was assumed by that court as a matter of course.

The foregoing decision having been certified to the State Circuit Court of Michigan for St. Clair County, the case was brought to trial in that court at the last November term, and defendant was convicted of murder in the second degree, and sentenced to imprisonment in the State prison for six years. The former punishment, inflicted by the United States Circuit Court, was imprisonment for thirty days and a fine of one dollar.

INTELLIGENCE AND MISCELLANY.

The County Court Judges in England seem to be attaining great distinction. We find in the Upper Canada Law Journal the following article on the subject of a ruling of Judge Everett in the case of a Canary bird. It seems that his honor's dignity would not allow him to try the value of such small deer. This decision would have been peculiarly appropriate to have been made by our friend Sergeant Storks, if he were still on the County Bench. But the judicial value of Storks was so unanimously settled by the press, that he has taken the hint and gracefully retired.

THE CANARY AND THE COUNTY JUDGE. — The County Courts of England, as our readers know, are similar in their constitution, jurisdiction, and procedure, to the Upper Canada Division Courts. The Judge decides both upon law and facts, and, like our local Judges, may exercise a large discretion. Our Judges, however, do not venture to *legislate*, — they declare the law, they do not attempt to manufacture laws to suit their own particular views.

A certain Judge (Everett), who enlightens the profane vulgar resorting to the Salisbury County Court (England), has announced a new principle, not discoverable in the books as we on this side of the Atlantic read the law; and which the learned Judge must have drawn from his own brains instead of from his books, unless, indeed, by some curious process of reasoning, he has discovered it in the maxim, *de minimis non curat lex* (the law does not concern itself about *Canaries*).* The case of *Mathews* v. *Redway*, reported in the *County Courts Chronicle*, is our authority. The question was as to the value of a Canary bird, and on the case being called, His Honor Judge Everett said, " he would never allow such a case to be brought into Court, without setting his face against it. He would decline to try it, and the plaintiff might go to the Queen's Bench for a *Mandamus* to compel him, if he pleased. He would never sit to try such rubbish as the value of a Canary bird."

We assume, a sale by the plaintiff to the defendant, and the action brought to recover the " value " of the bird.

The County Courts are " small debts Courts," and are so designated in the Act. The Legislature has not given any arbitrary meaning to the words " small debts," and in their ordinary signification, they include all debts however trifling in amount.

We believe that, in some of the United States, debts under a certain named amount, are, by positive enactment, not recoverable through the Courts, but we never heard of such an enactment in England, or in any British Colony where the law of England is the rule for decision of civil rights. And in the absence of any statutory provision, Mr. Everett, we are bold to say, was guilty of a denial of justice, in refusing to entertain a case because the debt claimed was very small. Not even the musical aspect of this little case, could soothe the angry feelings in the Judge's breast. Poor birdie — poor plaintiff. If the learned Judge was so irate, the subject of the action being a Canary bird, how would he have felt if the matter was more minute, and involved a question as to the value of one well trained " industrious flea." But we must not dwell too much upon what our brother of the *County Courts Chronicle* pronounces an " error in judgment," while admitting fully the general excellence of the decisions given by the County Court Judges, and the good sense, temper, and discretion, with which their actions are guided.

Our contemporary goes on to say, " It is not because in this solitary case the matter relates to a Canary bird only, that we advert to it, but we offer some few remarks, because we think an important principle is involved in

the question. Articles may derive their value from peculiar and adventitious circumstances; and to take this very case before us, a Canary may not be a bird to afford much in the way of nourishment for the table, like a Dorking pullet, or an Aylesbury duck; but, as an article of trade, to be bought and sold by professed dealers in such things, a Canary may range in value, we believe, from 3s. to 30s., or more. Societies are formed for improving their breed, and the Crystal Palace does not disdain to hold exhibitions of them, and to decree prizes to the owners. Will it be maintained, that if a stranger wantonly kill or maim such a bird, the owner is to be deprived of the power of seeking compensation for the loss he has sustained? But we go further than this — we look to the principle upon which the refusal of the learned Judge to try the case, is based, and we cannot but think it unwise, and unsafe to say, that in a Court which has been characterized essentially 'the poor man's Court,' any matter, however apparently trivial, where there is a wrong to be remedied, and justice to be done, is unworthy of being heard and decided."

We cordially concur in these remarks, and go further. We assert, the action of the Judge was not only ill-judged, but contrary to law. If men fail to receive justice through the Courts, they will be apt to carve out justice for themselves. Five shillings may be a matter of no moment to the man who is worth 50s. or more a day, but to him whose earnings for a day would not equal 5s., it is of consequence.

A Canary bird worth a crown, may be one of a stock numbering thousands,— indeed, a man's whole means may be invested in the "Bird trade," and if he chooses to sell every single bird on credit, is he to be told, you cannot recover the price of any such rubbish, as the value of a Canary bird is not worthy of notice.

Our local Judges, we believe, are, as a class, not inferior to the County Court Judges of England. They possess a more extended jurisdiction, being Judges of Superior Courts as well as of Inferior, and we have seen one of the ablest of our Judges, on one day disposing of a "question of value" extending to ten thousand pounds, and the following day in the Division Court (analagous to the English County Courts,) patiently investigating a case, the amount claimed being ten shillings.

The Superior Courts of Common Law in England, do not disdain to take cognizance of an action for two guineas, and even for less than that amount, if satisfied that there is no other Court to which the sum could be recoverable; and Judge Everett might have tried the little Canary case, small though the subject, without damage to his dignity.

There is always danger from pernicious example, and we are accustomed to look to the Past for light. In this point of view, the case is not undeserving of notice. One word more; it has been well observed, that the local Courts though commonly dealing in matters trifling in amount, "are not small Courts, for the principle of justice renders them great."

THE INNS OF COURT VOLUNTEER RIFLE CORPS. — The Court was densely crowded this morning in consequence of the Lord Chancellor having expressed his intention to administer the oath of allegiance to the first and second companies of the above-named Volunteer Corps.

The LORD CHANCELLOR, previous to administering the oath, delivered the following address to the volunteers: — It gives me high satisfaction that I have been called upon to administer to you the oath of allegiance on your entering as volunteers into the military service of the Crown. I rejoice in the national movement which is now displayed, and the ardor with which you participate in it seems to me to be very creditable to the Profession to which we belong. You are ready to defend the liberties of your

country not only in the forum but in the field. Gentlemen, this movement is not prompted by any immediate apprehension of danger, nor from suspicion of the designs of any particular foreign ruler or state. Fortunately, we are in amity with all nations, and I trust that we are long likely to continue so. But the opinion generally prevails, and I believe it is well founded, that the martial disposition of our population has not of late years been sufficiently encouraged, and that our defences against foreign invasion have not kept pace with the increased facilities of effecting a landing on our sacred soil. Hence the danger of panic at home, and of holding out a temptation abroad to take advantage of our supposed unpreparedness. England is free from all notion of aggression; we are satisfied with the excess of colonial and foreign possessions, and we desire without interruption to cultivate the pursuits of peace; but to secure these blessings we must bear in mind that war may come upon us unexpectedly, and that to ward off invasion we must be prepared to repel it. Gentlemen, in my early youth, when a student of law, I myself was a soldier, and perhaps I might say, "*Militavi non sine gloria.*" I served in a most distinguished corps, the Inns of Court Volunteers of that day, remarkable for its discipline and efficiency, and I had the honor of being reviewed in Hyde Park by His Majesty King George III., with above 10,000 volunteers, then and there assembled, ready to march to the coast on the first alarm of the sailing of the Armada at Boulogne, which only waited for a fair wind, for Sandwich or Pevensey. Gentlemen, we did our duty while the war lasted; but we, or rather the Government of that time, must be blamed for allowing all the volunteer corps in the kingdom — amounting, I believe, to between 30,000 and 40,000 men — to be disbanded and dissolved as soon as peace was proclaimed. For nearly half a century we have had no citizen soldiers among us, and we have depended for our safety against invasion on defenders regularly in the pay of the State, who, renouncing all civil employments, professionally devote themselves to arms. These are most gallant defenders, and we place unbounded confidence in their heroism; but they may be greatly outnumbered by the immense bands of veteran troops who may be disembarked on our shores, and they ought to be supported by our citizens voluntarily trained to arms in every county, city, and parish in the realm. Gentlemen, it delights me to think that we approximate to a consummation so devoutly to be wished. You have set a noble example, which I doubt not will be universally followed; and let me express my anxious hope for your steadiness and perseverance in your military career. As the movement does not proceed from any momentary impulse or temporary cause, let it be permanent. I have to congratulate you on being furnished with a new weapon, the Enfield rifle, said to be so much superior to that to which we trusted — the now ridiculed Brown Bess. In devoting a portion of each day to martial exercises, I can say, from observation and experience, that you will neither impede your legal studies nor injure the interests of your clients. Let the rifle be now daily in the hands of our fellow-citizens as the bow was once in the hands of our ancestors, and may English riflemen be as superior to all others as English bowmen once were. — *Law Times.*

The Beatson Libel Case. — The curs are in full cry again, yapping at the heels of Baron Bramwell. This time his offense is that he expounded the law so clearly to the jury in the famous Beatson libel case that they could not help returning a verdict for the defendant, spite of the "fervent eloquence," as it is described, of the speech of Mr. Edwin James. A reader of some of the newspapers would suppose, from the fierceness of the invectives poured upon the learned Baron, that he had been guilty of

shameful perversions of law and fact in his summing up, which is unceremoniously termed "a monstrous piece of toadyism;" a doing of all he could "to misdirect" the jury; a "monstrous injustice," which will not fail "to rouse the indignation of both Houses" of Parliament; "the toadyism of the judge towards the Government." He is called "a *bent* judge," and it is asserted that "a more oppressive, or more unjust case is hardly to be met with in the annals of our courts of law."

What is the meaning of all this potheration?

Let us first observe that the writers who accuse Baron Bramwell of "toadyism" cannot know him. He has his faults, like other men, but toadyism certainly is not one of them; they run rather in the opposite direction. But what is his offending? The action was brought by General Beatson against Mr. Skene, private secretary to General Vivian, the British Civil Commissioner and Consul at Aleppo, for an alleged libel contained in a report made by Mr. Skene to General Shirley in his official capacity.

The report was undoubtedly false in fact, but the defence was, that Mr. Skene was acting *bona fide* in the discharge of his duty, which was to report to his principals whatever was rumored, and that the communication was therefore privileged.

This was the question really at issue, and it was the manifest duty of the judge to state to the jury the law upon this point of privilege, and to tell them that all they had to consider was whether the communication was made *bona fide* in the performance of a duty, or maliciously; and this Baron Bramwell did in these words, as reported in the *Times:* —

He should confine himself strictly to the legal points of the case. The plaintiff complained that the defendant had spoken certain defamatory words of him, imputing to him an attempt to excite his officers to mutiny in order to prevent the transfer of the command of the Bashi-Bazouks from himself to General Smith. That was the first charge. The second charge was that General Beatson had caused round-robins to be circulated among the native officers and men for them to sign, refusing to serve under any other officer than himself. If the words were not of a defamatory character, the defendant would be entitled to a verdict upon the ground that he did not speak the words complained of. If, however, they thought that the words in the declaration were spoken by the defendant, so far their verdict must be for the plaintiff. Then came another question. Admitting that he spoke them, were they spoken under circumstances which made them a privileged communication? He was not going to lay down a great deal of law upon the subject, but independently of the faith which people had in what they saw printed, he thought he could do no better than read the opinions of Mr. Justice Erle (now the Chief Justice of the Common Pleas) and Mr. Justice Maule upon the point of what a privileged communication was. Those learned judges said that where the speaker was under any duty to the person spoken to, the words were privileged, and also that there were many cases where volunteer statements were privileged. Was it the duty of Mr. Skene to make the communication in question? He was told to inform General Shirley what were the causes of any irregularities that had taken place among the troops, and also any other particulars he might consider important. It might almost be said that the antecedents of such a corps were most important to discover the causes of the irregularities then being committed, and it was difficult to say that they were not a relevant part of such an inquiry. But he could scarcely help thinking that the question did not stop there, because if Mr. Skene was told to render every assistance to General Shirley, and to give him every information upon any subject connected with the corps, and General Shirley had put

certain questions to him, what would have been the case if he had said, "I shall not answer you, — you are going beyond your commission?" He should say that, under such circumstances, it would be the hardest thing in the world if the answers he gave to such questions were not privileged, and he told the jury that in law such answers would be privileged. Therefore, in case they found that the defendant made the statement *bona fide* in the discharge of his instructions, or in answer to General Shirley's questions, even if they did not apply to matters mentioned in such instructions, it was a privileged statement, and the defendant was entitled to their verdict. But the question would in that case still remain whether the communication was made by the defendant strictly in discharge of his duty, or merely as a matter of gossip which he would have retailed to any one else. Suppose he went to ask the character of a servant, and the former master said, "Perhaps I had better tell you something about his brother," and he said he did not want to hear it. "Oh, but," the master might say, "it is a curious story, and I will tell you." In that case his communication would not be privileged; but if the master told him a story about the servant at his request, it would be privileged. Now, under what circumstances did Mr. Skene make the communication? In the first place, General Shirley had been there some time before the defendant mentioned it at all. How did it come out? It came out during a conversation about the payment of one of the regiments. General Shirley said that the double payment was an irregularity, and the defendant said that was not the only irregularity that had occurred, and then proceeded to volunteer the statement in question. Was that statement *apropos* of what took place about the payment of the troops? Then, was there any malice on the part of Mr. Skene? for if there was, his statement was not privileged under any circumstances. He really could not suppose that there was any malice on Mr. Skene's part. Such a despicable feeling ought not lightly to be attributed to any one. General Beatson's character had been cleared, for he did not suppose he would have been continued in his command if the authorities had not been satisfied that the charges were untrue. But he must say it would have been more becoming on the part of Mr. Skene if he had instructed his counsel to say, not that he made no charge against General Beatson, but that he gladly seized the opportunity of saying that the reports he gave circulation to be now recognized as untrue. A man ought not to be above declining to make such an acknowledgment to one whom he had unintentionally injured. No doubt, Mr. Skene believed he was speaking the truth; but if, in point of law, he was guilty of circulating a libel, he must be made to pay damages for it. The question of damages was entirely for them. They would say, first, whether in their opinion the defendant spoke the words charged in the declaration; secondly, whether those words were privileged; thirdly, whether there had been malice on Mr. Skene's part; and then, if they found all these questions in favor of the plaintiff, the amount of damages. The jury retired, and in about half an hour returned and found a verdict for the defendant on the ground that the words were privileged. At the same time they wished to express their strong opinion upon the fact that when the defendant found how unfounded the charges were, he had not retracted them.

Edwin James, Q. C., moved for a new trial for misdirection in the learned Baron's not taking on himself to decide whether or not the communication was privileged, as it was a question of law, not one of fact for the jury; that the verdict was against the weight of evidence; and that the judge should have required the production of the defendant's statement in writing from those in attendance from the War Office, who were in court with it. — *Law Times.*

INSOLVENTS IN MASSACHUSETTS.

Name of Insolvent.	Residence.	Commenceme't of Proceedings.	Name of Judge.
		1860.	Returned by
{ Banchor, John (1)	New York,	January 14.	Isaac Ames.
{ " John F.	Boston,		
Becker, Andrew	Sherborn,	" 14,	Wm. A. Richardson.
Blake, Henry H. (2)	Cambridge,	" 12,	" "
Blanchard, John P.	Randolph,	" 25,	George White.
Bowker, Daniel	Boston,	" 12,	Isaac Ames.
Boyden, Joseph A. (1)	North Chelsea,	" 14,	"
{ Brewer, Samuel N. (3)	Boston,	" 4,	"
{ " Wm. A. (3)	Cambridge,		
Brown, Robert B.	Boston,	" 31,	"
Brown, Wm. D.	"	" 30,	"
Bubier, John H.	Lynn,	" 5,	George F. Choate.
Bullock, Jesse	Haverhill,	" 6,	" "
Campbell, Robert M.	Cambridge,	" 21,	Wm. A. Richardson.
Carter, Nathaniel	"	" 4,	" "
Clear, Richard	Boston,	" 26,	Isaac Ames.
Comstock, Jesse	Southbridge,	" 16,	Henry Chapin.
Conway, Hugh	Salem,	" 13,	George F. Choate.
Coverly, James W. (4)	Somerville,	" 14,	Wm. A. Richardson.
Cowdrey, Nathaniel W.	Pepperell,	" 23,	" "
Crosby, Josiah L. (4)	Somerville,	" 14,	" "
Davis, James S. M.	Rutland,	Jan. 9 and 10.	Henry Chapin.
Davis, Sidney G.	Lexington,	" 9,	" "
Doane, Joseph C.	Dorchester,	" 5,	George White.
Fowle, John A. (5)	West Roxbury,	" 30,	" "
Gilligan, Michael	Roxbury,	" 21,	" "
Gilson, Walter H.	New York City,	" 5,	Wm. A. Richardson.
Goodwin, Enoch	Boston,	" 7,	Isaac Ames.
Hadley, Wm. E. (2)	Cambridge,	" 12,	Wm. A. Richardson.
Hall, John N. (5)	West Roxbury,	" 30,	George White.
Hall, Theodore N.	Bradford,	" 14,	George F. Choate.
Harlow, James H.	Plymouth,	" 28,	Wm. H. Wood.
Hill, Kittredge	North Brookfield,	" 10,	Henry Chapin.
{ Holt, Wm. H. (6)	Medford,	" 5,	Wm. A. Richardson.
{ Howard, A. (6)	Malden,		
Jones, Thomas F.	Boston,	" 4,	Isaac Ames.
Keuran, Hugh E.	Greenfield,	" 12,	Charles Mattoon.
Knowles, Seth, Jr.	Orleans,	" 2,	Joseph M. Day.
Lowd, Thomas Q.	Boston,	" 7,	Isaac Ames.
McGann, Wm. H.	Braintree,	" 4,	George White.
Mitchell, Wm.	Roxbury,	" 30,	" "
Murray, John W.	"	" 3,	" "
Muzzy Rifle Barrel and Gun Manufacturing Co.	Lowell,	" 13,	Wm. A. Richardson.
Nourse, Calvin D.	Shrewsbury,	" 10,	Henry Chapin.
Nute, Andrew T.	Dorchester,	" 10,	George White.
O'Brien, John	Somerville,	" 28,	Wm. A. Richardson.
Parker, Charles	West Roxbury,	" 28,	George White.
Parkhurst, Samuel S.	Lowell,	" 4,	Wm. A. Richardson.
Peck, Dyer H.	West Roxbury,	" 24,	George White.
Piper, Samuel G.	Lynn,	" 12,	George F. Choate.
Price, Augustus E.	Salem,	" 20,	" "
Reid, W. A. (7)	Sutton,	" 30,	Henry Chapin.
Rhoades, George W.	Littleton,	" 5,	Wm. A. Richardson
Rice, Thomas G.	Cambridge,	" 9,	" "
Rich, Richard	Truro,	" 9,	J. M. Day.
Robinson, Orren	Boston,	" 24,	Isaac Ames.
Rowell, Samuel (8)	Salem,	" 31,	"
Smith, John W.	Boston,	" 21,	"
Spofford, Uriah G.	Essex,	" 21,	George F. Choate.
Stiles, Wm. L.	Watertown,	" 7,	Wm. A. Richardson
Stone, Charles	Cambridge,	" 21,	" "
Underhill, Jesse J. (8)	Chelsea,	" 31,	Isaac Ames.
Upham, Benjamin R.	Melrose,	" 18,	Wm. A. Richardson.
Wadleigh, John C.	Lawrence,	" 6,	George F. Choate.
Wentworth, Jacob S.	Lynn,	" 2,	" "
Whitney, Freeman S.	Natick,	" 20,	Wm. A. Richardson.
Willis, Royal B.	Lexington,	" 7,	" "
Wilson, Dexter	Worcester,	" 6,	Henry Chapin.
Winsor, ——	Orleans,	" 24,	J. M. Day.
Woodbury, S. J. (7)	Sutton,	" 30,	Henry Chapin.

FIRMS. (1) Banchors & Boyden. — (2) Blake & Hadley. — (3) S. N. & W. A. Brewer. — (4) Crosby & Coverly. — (5) Not stated. — (6) Holt, Gilson & Co. — (7) Not stated. — (8) Rowell, Underhill & Co.